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# The Evolution Toward Judicial Independence in the Continuing Quest for LGBT Equality

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# THE EVOLUTION TOWARD JUDICIAL INDEPENDENCE IN THE CONTINUING QUEST FOR LGBT EQUALITY

*Susan J. Becker*<sup>†</sup>

## ABSTRACT

Judicial decisions that hold same-sex marriage bans unconstitutional, no matter how that conclusion is reached, overturn laws or constitutional provisions that were passed with the support of a democratic majority. This Article takes an in-depth look at judicial activism and judicial independence to determine whether such victories for same-sex litigants were done properly by the judiciary. In the eyes of the Framers, an independent judiciary was to be a crucial check on the other branches' constitutional limitations. With this in mind, judicial independence—where, in contrast with activism, judges meticulously apply the well-examined facts to controlling precedent without accounting for majority views—is a key to maintaining our democratic system.

This Article examines many of the cases that resulted in victories for LGBT litigants. First, cases ruling state same-sex marriage bans unconstitutional, for example, Hawaii's *Baehr v. Lewin* and Iowa's *Varnum v. O'Brien*, are analyzed. Also, the cases declaring the federal Defense of Marriage Act unconstitutional, including *Gill v. Office of Personnel Management*, *Massachusetts v. U.S. Department of Health and Human Services*, and the district court, circuit court, and Supreme Court decisions in *Windsor*, are discussed. Although these cases tend to overturn laws supported by democratic majorities, the courts pay great attention to the details of the cases and steadfastly analyze and apply precedent.

After looking in detail at cases establishing same-sex marriage rights, one must conclude that the courts engaged in strong judicial independence. Such independent judicial decision making contains sound legal analysis and is constitutionally necessary.

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## INTRODUCTION

Many years have passed since Professor Rhonda Rivera published her groundbreaking research on the disadvantaged legal status of gay and lesbian citizens in this country. Titled *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*,<sup>1</sup>

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1. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979) [hereinafter Rivera I]. This article is reprinted in full at 50 HASTINGS L.J. 1015 (1999); see also Rhonda R. Rivera, *Our Straight-Laced Judges: Twenty Years Later*, 50 HASTINGS L.J. 1179 (1999) [hereinafter Rivera II] (explaining the lack of legal literature in the 1970s on how the

Rivera's 157-page tome documented the dearth of legal protections and abundance of judicial prejudice evident in cases where the sexual orientation of one or more litigants was at issue.<sup>2</sup> Her exhaustive analysis of judicial decisions resolving controversies in private and public employment, military service, professional licensing, public school teaching, family law, First Amendment free speech and association, immigration and naturalization, criminal law, and other issues amply supported the conclusion Rivera foreshadowed in the title of her article. "[J]udges in particular, as well as attorneys, need to examine their homophobic attitudes and the many popularly held myths and stereotypes,"<sup>3</sup> Rivera wrote. "Only after such a reevaluation of judicial and societal attitudes can our legal system begin to achieve a fair and equal application of the laws to all persons."<sup>4</sup>

The majority of relatively recent court decisions—including the U.S. Supreme Court's groundbreaking decisions in *Romer v. Evans*,<sup>5</sup> *Lawrence v. Texas*,<sup>6</sup> and *United States v. Windsor*<sup>7</sup>—suggest that many judges have begun engaging in the reflection Rivera had hoped for, embracing a more neutral stance on homosexuality and devoting more attention to the facts and law of the cases before them that involve lesbian, gay, bisexual, and transgender (LGBT) litigants.<sup>8</sup>

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law affected LGBT people and the efforts that went into producing the first major article on the subject and outlining the advances and setbacks LGBT litigants had experienced in the intervening twenty years).

2. Rivera I, *supra* note 1; see also Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993) (providing a legal history of litigation involving LGBT litigants with primary focus on cases decided prior to 1986); Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1139–47 (1979) (documenting legal struggles faced by transgender and intersex individuals).
3. Rivera I, *supra* note 1, at 1168.
4. *Id.*
5. 517 U.S. 620 (1996).
6. 539 U.S. 558 (2003).
7. 133 S. Ct. 2675 (2013).
8. See generally MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010) (providing analyses of recent landmark decisions affecting LGBT rights and suggesting that state and federal court judges are moving toward a humanity-centered vision that recognizes LGBT people as worthy of constitutional rights and protections); Susan J. Becker, *Many Are Chilled, but Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL'Y & L. 177 (2006).

This Article posits that court decisions extending equal rights to LGBT litigants are not, as some critics claim, the result of improperly motivated “judicial activism” or “culture wars” being waged inappropriately in courts of law. To the contrary, pro-equality decisions reflect the trend toward eradication of improper judicial bias that historically animated judicial decisions in cases involving LGBT litigants. In contrast to Justice Antonin Scalia’s view that judicial decisions in which LGBT litigants prevail capitulate to the “homosexual agenda,”<sup>9</sup> this article explains that decisions advancing LGBT equality are based on an appropriately restrained application of law to facts, thus moving the judiciary closer to the elusive ideal of judicial independence.

Arguments supporting this thesis are presented as follows. Part I of this Article contrasts the abstract principle of judicial independence as a cornerstone of U.S. democracy with the practical realities of judicial decision making. Part II highlights the historical lack of independence exercised by judges that resulted in unjust decisions and perpetuated negative stereotypes of LGBT persons. Part III explores the more recent trend of judges moving away from anti-LGBT animus towards neutrality and independence in cases involving LGBT litigants. Part III also examines the reasons for the lessening of anti-LGBT judicial bias, focusing specifically on the compelling facts and evidence presented in state and federal marriage equality cases, including the Supreme Court’s *Windsor* decision.

## I. JUDICIAL INDEPENDENCE OVERVIEW

*Only an independent judiciary can ensure that the minority is protected from the tyranny of the majority. Only an independent judiciary committed to the rule of law can safeguard every citizen’s liberties and rights.*<sup>10</sup>

### A. *The Theoretical Ideal*

Judicial independence demands that judges resolve cases with fidelity to the “rule of law” established in case precedents, statutes, and procedural rules.<sup>11</sup> Decisions rendered in adherence to this

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(tracking changes in societal and judicial attitudes toward LGBT people over the past several decades and predicting that full equality will eventually be gained in this country).

9. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).
10. Marsha K. Ternus, *Judicial Independence in Peril?*, 60 CLEV. ST. L. REV. 479, 487 (2012).
11. See, e.g., Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996) (emphasizing that judicial independence requires judges to “decide according to law, rather than according to their own whims or to the will of the political branches of

principle are immunized from improper influences such as personal interests, religious beliefs, concern for popular opinion, and the desire to please special interest groups.<sup>12</sup> As one judicial observer explains, “[i]ndependent and impartial adjudication denies the notion that the judge will bring to bear a view which represents that of a particular section of the community.”<sup>13</sup>

The principal architects of the U.S. Constitution identified an independent judiciary as essential to the survival of the nascent republic.<sup>14</sup> James Madison observed that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>15</sup> Alexander Hamilton urged that constitutional limitations imposed on Congress—“for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like”<sup>16</sup>—could only be achieved through “complete independence of the courts of justice.”<sup>17</sup> Hamilton also defended the Constitution’s lifetime appointment of federal judges as “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”<sup>18</sup>

In language relevant to the contemporary struggle for LGBT equality, Hamilton recognized the crucial role of judicial independence in protecting the rights of minorities:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the

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government”); Ternus, *supra* note 10, at 480 (defining the rule of law as “a process of governing by laws that are applied fairly and uniformly to all persons”).

12. Ternus, *supra* note 10, at 480 (stating that judicial independence demands a “judiciary that is committed to the rule of law, independent of—free of—outside influence, including personal bias or preference”).
13. Anthony Mason, *The Appointment and Removal of Judges*, in *FRAGILE BASTION: JUDICIAL INDEPENDENCE IN THE NINETIES AND BEYOND* 1, 4 (Helen Cunningham ed., 1997).
14. Judicial autonomy was not a novel idea. Rather, “the political theory of an independent judiciary is the culmination of the work of eight political theorists writing over the span of 22 centuries, with each building on the contributions of the others.” SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1607–1787*, at 325 (2011).
15. *THE FEDERALIST* NO. 47, at 313 (James Madison) (Edward Meade Earle ed., 1937).
16. *THE FEDERALIST* NO. 78, at 505 (Alexander Hamilton) (Edward Meade Earle ed., 1937).
17. *Id.*
18. *Id.* at 503.

influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.<sup>19</sup>

Hamilton further cautioned that judges need “an uncommon portion of fortitude” to faithfully guard the Constitution “where legislative invasions of it ha[ve] been instigated by the major voice of the community.”<sup>20</sup> Hamilton’s perspective became a cornerstone of constitutional jurisprudence.<sup>21</sup>

Several centuries after Hamilton’s plea, Ninth Circuit Judge J. Clifford Wallace observed that “although the Constitution imposes no absolute limits on popular decision making, constitutional protections and structures do represent significant practical restraints on the scope of majoritarian democracy.”<sup>22</sup> Constitutional structure, Judge Wallace explained, reflects the Framers’ intent for “the judicial branch to have a special role in the protection of [individual] rights.”<sup>23</sup> The majority of colonies and the first states adopted similar governmental structures based on this rationale.<sup>24</sup>

Efforts to safeguard judicial independence are deeply embedded in state and federal constitutions and statutes and the regulatory schemes that govern judges, lawyers, and others who interact with the judiciary. The effectiveness of these measures to ensure judicial independence remains subject to debate.

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19. *Id.* at 508.

20. THE FEDERALIST NO. 78, *supra* note 16, at 509 (Alexander Hamilton).

21. Hamilton’s prediction that lifetime tenure of federal judges was essential to judicial independence has been vindicated by the fact that “no federal judge has ever been removed by impeachment for rendering an unpopular decision, although the media and politicians regularly level all kinds of scornful epithets at judges.” Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219, 231 (2004).

22. J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 205, 206 (David M. O’Brien, ed., 4th ed. 2013).

23. *Id.*

24. See generally GERBER, *supra* note 14 (explaining the concept of separation of powers from Aristotle through the drafting of the U.S. Constitution with focus on the origins of an independent judiciary in the original thirteen states and their colonial predecessors). Others have observed that although judicial independence is commonly evaluated through the lens of constitutional law decisions, it is also of great value in disputes that demand neutral evaluation and application of various legal authorities other than constitutional law and doctrine. *Id.* at 334 n.35.

For example, the President's power to appoint federal judges is severely constrained by the requirement that nominees are elevated to the federal bench only upon the "[a]dvice and [c]onsent of the Senate."<sup>25</sup> This significantly limits the President's power to appoint justices based solely on the President's personal-political litmus test.<sup>26</sup> State judges face retention or contested elections, thus making them accountable to the people for decisions that appear to unfairly favor particular positions or parties.<sup>27</sup>

Judicial ethics codes further circumscribe the conduct of judicial candidates and judges.<sup>28</sup> For example, the premier rule in the

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25. U.S. CONST. art. II, § 2; *see also* KEVIN L. LYLES, *THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS* 187 (1997) ("Senate majority leader Trent Lott warned Clinton that the GOP majority would 'resist with every fiber of [its] being' if Clinton 'name[d] the kind of federal judges who would overturn this week's election results with next year's court decisions.'"); LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 85–116 (2005) (describing the process for nominating Supreme Court justices, including the role of politics and ideology in that process); NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (2005) (describing how congressional representatives support judicial candidates who support their policies).
  26. Of course this safeguard is severely tested if not eliminated when: (1) the President and a majority of Senators share the same political ideology; and (2) the President and a sufficient number of Senators have severely conflicting ideologies that prevent the President's nominees from being confirmed. The latter situation has been a defining characteristic of President Obama's time in office. *See generally* Sheldon Goldman, Elliot Slotnick & Sara Schiavoni, *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 262 (2011) (containing extensive analysis of presidential judicial appointments in historical context).
  27. Controversy continues as to whether merit selection of judges followed by a retention election or contested judicial elections provide the superior method of achieving a well-qualified, independent judiciary. *See* Symposium, *Judicial Elections*, 64 ARK. L. REV. 1 (2011) (providing a number of informative articles on issues relating to judicial elections in the states); Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL'Y 67 (2009) (advocating for merit selection systems); Wald, *supra* note 21, at 223–24 (observing that "[i]ndependence-oriented critics deplore the pressures imposed by direct election of the high court judges in a majority of states, and democracy-oriented critics are constantly reminding us of the unaccountability of life-tenured federal judges who they say are too often free to follow their own preferences rather than 'the law' or the public's will").
  28. Each state has its own system of regulating its judicial officers and employees, and many have adopted the *ABA Model Rules of Judicial Conduct* or modified versions thereof. Federal judges must follow the regulations articulated in the *Guide to Judiciary Policy*, including the *Code of Conduct for United States Judges*, which was substantially



American Bar Association's (ABA) *Code of Judicial Conduct* mandates that judges "shall uphold and promote the independence, integrity and impartiality of the judiciary," avoiding not only impropriety but "the appearance of impropriety."<sup>29</sup> Judges must also avoid making decisions based on personal bias or prejudice<sup>30</sup> and "shall not be swayed by public clamor or fear of criticism."<sup>31</sup> In short, the ethics rules are part of a larger regulatory scheme that reflects "a central core of agreed standards" that define judges "as the neutral, impartial, calm, noncontentious umpire standing between the adversary parties."<sup>32</sup>

Respect for the theory of judicial independence is not, of course, a uniquely American phenomenon. The advantage—indeed the necessity—of judges unconstrained by personal bias, political pressure, and other coercive forces has long been recognized elsewhere. This is especially clear in international human rights.<sup>33</sup> The *International Covenant on Civil and Political Rights*, for example, declares that "[a]ll persons shall be equal before the courts and tribunals," and that once charged with a crime, "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>34</sup> The *Universal Declaration of Human Rights* similarly champions the idea that "[e]veryone is entitled in full

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revised in 2009 and partially revised in 2014. GUIDE TO JUDICIARY POLICY: CODE OF CONDUCT FOR UNITED STATES JUDGES (2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

29. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011). It is notable that the Canons 1 and 2 of the *Code of Conduct for United States Judges* (2009) contain similar language.
30. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2011); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (2009).
31. MODEL CODE OF JUDICIAL CONDUCT R. 2.4 (2011); see also CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(1)(2009) (containing similar language).
32. Marvin E. Frankel, *The Adversary Judge: The Experience of the Trial Judge*, in JUDGES ON JUDGING, *supra* note 22, at 79, 80.
33. See generally HAROLD BAER, JR., JUDGES UNDER FIRE: HUMAN RIGHTS, INDEPENDENT JUDGES, AND THE RULE OF LAW (2011) (providing inspiring stories of judges who have refused to succumb to political pressure and other outside influences, often at great personal cost); Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, 85 JUDICATURE 195 (2002).
34. International Covenant on Civil and Political Rights, art. 14, § 1, Dec. 19, 1966, 999 U.N.T.S. 172, 176. This document is now joined by over 160 nations. U.S. DEP'T OF STATE, TREATIES IN FORCE 409 (2013) (listing nations that are parties to the treaty); see also Wald, *supra* note 21, at 227–29 (emphasizing the importance of independent judges on international courts).

equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”<sup>35</sup>

*B. Theory Meets Reality*

1. The Formalism-Realism Divide

Legal commentators have produced thousands of books and articles attempting to explain how judges decide cases.<sup>36</sup>

In the eighteenth and nineteenth centuries, judicial decisions were rarely seen as illegitimate exercises of power. Based on the oracular theory of judicial decision making, judges simply divined established truths from a sufficient body of predominately common law. Viewed through this somewhat esoteric lens, the “law was conceived as a mystical body of permanent truths, and the judge was seen as one who declared what these truths were and made them intelligible—as an ‘oracle’ who found and interpreted the law.”<sup>37</sup> The oracle theory presupposed that court decisions were unaffected by the personal values or judgments of the jurists rendering them.<sup>38</sup>

The concept that came to be known as “formalism” similarly characterized the judicial decision-making process as so sterile and cerebral that the possibility of personal bias was inconceivable. Often associated with the judges who populated the U.S. legal system between the 1870s and the 1930s, formalism characterizes adjudication as a mechanical application of facts to law, yielding consistent and just results.<sup>39</sup> Formalism reflects the philosophy of

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35. UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 10 (1948).
36. *See generally* THE PIONEERS OF JUDICIAL BEHAVIOR (Nancy Maveety ed., 2003) (discussing the diverse approaches taken by political scientists beginning in the late nineteenth century in trying to devise and apply scientific paradigms for analyzing how judges decide cases); Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191 (2012) (providing overview of theories of judicial decision making and empirical studies of that process).
37. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 10 (3d ed. 2007).
38. FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 206 (1980).
39. GRANT GILMORE, THE AGES OF AMERICAN LAW 62 (1977). Formalists perceived law as “a closed, logical system” in which “[t]he judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been.” *Id.* Moreover, “the truth, once arrived at, is immutable and eternal.” *Id.*; *see also* JEROME FRANK, LAW AND THE MODERN MIND (1930) (describing formalist American thought). Formalist thought took root during the Civil War era and continued into the 1920s. *See generally* GILMORE, *supra* note 39,

Christopher Columbus Langdell, the influential dean of Harvard Law School who perceived law as a hard science akin to biology or chemistry.<sup>40</sup>

In the scientific realm, problems yield one correct answer. Applied in the legal realm, judges honored the doctrine of *stare decisis*<sup>41</sup> by carefully reviewing case precedents to find that single, correct answer. This practice, in turn, left “no need or room for a judge’s values or sense of the evolution of society.”<sup>42</sup> Formalism’s roots, however, can be traced back to the birth of the United States as an independent nation, as colonists’ intense distaste for the vast discretion exercised by royal judges fanned the flames of dissent.<sup>43</sup> During “the Revolution in 1776 Americans sought to severely limit this judicial discretion,” one historian argues.<sup>44</sup> “The aim, as [Thomas] Jefferson put it, was to end ‘the eccentric impulses of whimsical, capricious designing man’ and to make the judge ‘a mere machine.’”<sup>45</sup> More recently, formalism has been described as “the existence of an impermeable barrier between the domain of legal argument, on the one hand, and that of political or philosophical argument, on the other.”<sup>46</sup>

In contrast to the oracle or formalism views, Judge Jerome Frank and others led the legal realism movement commonly associated with the 1930s to present.<sup>47</sup> Legal realists reject the conceptualization of

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at 12; Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495 (1996) (noting that the formalistic perspective was greatly influenced by Christopher Columbus Langdell’s advocacy of law as a discrete “intellectual discipline independent of theology, moral philosophy, economics, or political science, one that involved the application of scientific methods to common law materials”).

40. ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817–1967*, at 175–76 (1967); Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 13 (1983).
41. “[S]tare decisis refers to the practice of a court deferring to some set of precedent for an institutional reason (in contrast to considering an issue afresh).” Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 789–90 (2012).
42. COFFIN, *supra* note 38, at 207.
43. Gordon S. Wood, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 49, 50 (Amy Gutmann ed., 1997).
44. *Id.*
45. *Id.* (quoting Thomas Jefferson, *To Edmund Pendleton* in 1 THE PAPERS OF THOMAS JEFFERSON 503, 505 (Julian P. Boyd ed., 1950)).
46. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 252 (1993).
47. See Roy Kreitner, *Biographing Realist Jurisprudence*, 35 LAW & SOC. INQUIRY 765, 770–71 (2010). The growth of realism’s popularity did not result in complete abandonment of formalism’s appeal. See, e.g., Herbert

judges as processors applying law to fact in a mechanized manner. Judge Frank, for example, observed that judicial decision making departed from the scientific process employed for geometry in at least two key ways. “First . . . the decisions of a judge inevitably draw upon his experience in a way that the judgments of a geometer do not,” notes one scholar.<sup>48</sup> “And second, they are always the result of a series of discretionary choices that have no counterpart in the science of geometry.”<sup>49</sup> As a result, Frank believed that “experience and choice are not merely compatible with the activity of judging; they are among its essential conditions.”<sup>50</sup>

Some realists conceptualize judicial decision making as judges reaching conclusions first, and then embarking on quests to identify facts and law supporting their desired outcomes, thereby undermining both predictability and credibility.<sup>51</sup> Adherents of this genre of realism “debunked rules, principles, and the aspiration for certainty as mere myths cloaking the willfulness inherent in judicial decisions.”<sup>52</sup>

This does not mean, however, that all judges, scholars, and others gathered under the “realist” umbrella viewed judicial decision making as a fraudulent process. As one scholar explained, many “realists pointed to the role of idiosyncrasy in law, but they believed in a rule of law—hence they attempted to make it more efficient and more certain.”<sup>53</sup> Far from being diehard cynics, realists hoped their observations about the judicial process would serve “to increase the certainty and predictability of law, to better train lawyers, to advance legal justice, and to reform the law to better serve social needs.”<sup>54</sup> A

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Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (arguing that courts should apply constitutional principles from an abstract perspective rather than the more personal effect of those principles on the litigants, urging that “the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved”).

48. KRONMAN, *supra* note 46, at 189.

49. *Id.*

50. *Id.*

51. See FRANK, *supra* note 39, at 100; Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 444 (1930).

52. COFFIN, *supra* note 38, at 209; see also WHITE, *supra* note 37, at 204 (describing twentieth-century judges’ fall in status from oracle to “a social engineer, or a ‘hunch player’ who understood and trusted his instincts, or a craftsman in the ‘reasoned elaboration’ of justifications for his power”).

53. LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 231 (1986).

54. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 94 (2010).

perspective described as “prudential realism” embraced the view that “practical wisdom is needed in the study and administration of law.”<sup>55</sup>

## 2. Empirical Data on Judicial Decision Making

Many modern theorists rely on empirical studies to cast judicial decision making in more black-and-white terms: judges render decisions based on their political ideologies and to advance their personal and professional agendas and careers. These outcome-oriented models of judicial decision making are based primarily on studies of federal appellate judges and Supreme Court justices. Extant data lends significant support for both the attitudinal model, in which judges decide cases based on political ideology,<sup>56</sup> and strategic models of judicial decision making.<sup>57</sup>

Like all empirical studies designed to link cause and effect, empirical studies that identify factors influencing judicial decision making are subject to criticism due to potential methodological flaws and other shortcomings.<sup>58</sup> In addition, empiricists readily admit that

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55. KRONMAN, *supra* note 46, at 168, 196 (crediting Columbia Law Professor Karl Llewellyn with identifying prudential pragmatism, but Llewellyn did not describe the judicial decision-making process in those specific words). *Id.* at 225 (stating that Llewellyn “championed” and “provided the richest account” of prudential realism).
56. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002).
57. Strategic decision making can be defined in different ways. For example, it includes cases in which appellate judges concur in a majority opinion that at least guarantees their second-favored outcomes, thereby avoiding their lesser (and perhaps least) favored resolution of the case. For a discussion of how this type of strategic decision making can play out, see Nancy Scherer, *Viewing the Supreme Court’s Marriage Cases Through the Lens of Political Science*, 64 CASE W. RES. L. REV. 1131 (2014). It can also mean that “justices [become] far-sighted individuals who are wary of their counterpart players in American policy making,” and thus craft their decisions with an eye toward actions the legislative and executive branches may take in response to those decisions. Mario Bergara et al., *Modeling Supreme Court Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 249 (2003).
58. See, e.g., C. K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 136–51 (1996) (identifying shortcomings and biases inherent in the behavioral paradigm traditionally used to evaluate judicial behavior and suggesting that a revised model should take into consideration factors including the fact-finding process trial judges use to reach a decision in each case); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand The Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1905 (2009) (positing that despite “recent improvements in empirical studies, significant challenges remain”); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL’Y 133, 135 (2009) (observing that “skepticism of the empirical literature on judicial

“[f]requently the law is clear, and the judges should and will simply implement it,” regardless of the judges’ jurisprudential, political, or personal leanings.<sup>59</sup>

Regardless of whether the “science” of discerning judicial bias remains grounded in its own preconceived bias about the influence of politics on the courts and regardless of whether methodological errors or other limitations affect empiricist conclusions, the theory of judicial predictability based on the judges’ political attitudes has gained wide acceptance. Contemporary news media frequently focus on the political ideology, gender, or other factors unique to the judge or judges rendering a newsworthy decision.<sup>60</sup> News media also commonly identify the President who appointed the lower court judge rendering a decision in high-profile and controversial cases.<sup>61</sup> No further explanation is offered in these news reports, nor is one necessary, regarding the relationship between the decision rendered and the assumed judicial ideology that purportedly preordained—or that

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ideology cannot be wholly dismissed as the product of ignorance or self-interest on the part of the audience”); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235 (1999) (questioning the assumptions empiricists make about how judges decide cases).

59. CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 5 (2006); *see also* VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 34 (2006) (explaining that “a significant proportion” of cases reviewed by federal court of appeals judges “do not raise issues that are matters of first impression or [are] otherwise legally consequential,” and therefore “do not raise questions sufficiently salient to elicit much reaction from the judges deciding them”).
60. *See, e.g.*, Diane S. Sykes, *Gender and Judging*, 94 MARQ. L. REV. 1381, 1384–86 (2011) (describing media and public fixation on the gender split among Wisconsin Supreme Court justices in a case challenging the constitutionality of a lower court decision ordering a father of nine children not to have more children as a condition of his probation following his guilty plea on three felony counts of intentional nonsupport of existing children).
61. *See, e.g.*, Robert A. Levy, Editorial, *A Victory for Self-Defense: In the D.C. Gun Law Case, a Chance to Affirm the Second Amendment*, WASH. POST, Mar. 12, 2007, at A13 (opining on a recent D.C. Circuit decision that struck down the District of Columbia’s gun control laws and mentioning that “Senior Judge Laurence H. Silberman wrote the majority opinion, joined by Judge Thomas B. Griffith, a recent Bush appointee”); Ian Millhiser, *Reagan-Appointed Appeals Court Judge Rejects Religious Employer’s Attack on Birth Control Rules*, THINKPROGRESS (July 29, 2013, 12:31 PM), <http://thinkprogress.org/justice/2013/07/29/2373021/reagan-appointed-appeals-court-judge-rejects-religious-employers-attack-on-birth-control-rules/#> (commenting that “George W. Bush appointee Kent Jordan dissented from the panel’s decision”).

contradicts—the decision rendered. The public has accepted a correlation between politics and judicial decision making.<sup>62</sup> The public’s view is arguably confirmed by the great weight of empirical studies on judicial decision making in general and decision making involving LGBT litigants in particular.

*a. General Empirical Analyses*

Empiricists have toiled for years to isolate and quantify the factors that influence judges, seeking to identify a statistically significant link between jurists’ perceived ideologies and demographic traits and those jurists’ opinions.<sup>63</sup> For more than seven decades, political scientists and other researchers have employed quantitative and qualitative methodologies to explain how judges resolve cases, often focusing on the attitudinal characteristics assigned to U.S. Supreme Court justices.<sup>64</sup> Judge Richard Posner, for example, identified nine theories which purport to explain judicial behavior, all of which he considers “overstated or incomplete.”<sup>65</sup>

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62. In a national public opinion poll sponsored by the *New York Times* and CBS News that was conducted from May 31 to June 3, 2012, for example, seventy-six percent of respondents believed that the U.S. Supreme Court decides cases based on the individual justices’ personal and political views, while only thirteen percent of respondents thought the decisions were rendered based on “legal analysis.” *CBS News/New York Times Poll: May 31–June 3, 2012*, CBS NEWS (June 7, 2012), [http://www.cbsnews.com/htdocs/pdf/CBSNYTPoll\\_health\\_care\\_060712.pdf](http://www.cbsnews.com/htdocs/pdf/CBSNYTPoll_health_care_060712.pdf).
63. See generally THE PIONEERS OF JUDICIAL BEHAVIOR, *supra* note 36.
64. See, e.g., WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS (1961); GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946–1963, at 6–7 (1965) (discussing early research on judicial decision making); GLENDON SCHUBERT, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY (1974) (updating and refining Schubert’s earlier work by employing psychological theory to construct an empirical inventory of decisions that define the political ideologies of individual Supreme Court justices focusing primarily on the 1953–1969 period in which Earl Warren served as chief justice and confirming correlations between ideology and voting record); C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890 (1941) (presenting pioneering work in the area of empirical analysis of judicial decision making); Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294 (1964) (discussing political influences on judicial decision making).
65. RICHARD A. POSNER, HOW JUDGES THINK 19 (2008) (identifying the nine theories as “the attitudinal, the strategic, the sociological, the psychological, the economic, the organizational, the pragmatic, the phenomenological and . . . the legalist”). Posner’s use of the term “legalist” might be called “formalist” by other commentators. *Id.* at 7.

The self-labeling of this discipline as “political jurisprudence” and “judicial politics” signaled the researchers’ preconception that judges are political animals who are, in whole or in part, incapable or unwilling to fulfill the roles of independent actors.<sup>66</sup> It is perhaps not surprising, then, that the empiricists within this discipline have found strong correlations between judicial ideology and decision making, focusing intensively on the liberal-conservative divides among U.S. Supreme Court justices.<sup>67</sup> This attitudinal paradigm of judicial decision making is explained by two of its advocates as follows:

This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.<sup>68</sup>

Some empiricists offer more nuanced conclusions on the correlation between ideology and judicial decisions. Professor Frank Cross, for example, conducted extensive empirical review of 18,000 federal appellate decisions. Due to the sheer volume of cases heard by the circuit courts compared to the Supreme Court, Cross posits that these

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66. See TAMANAHA, *supra* note 54, at 111–55 (discussing political jurisprudence and potential preconceptions of the researchers); Nancy Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, in THE PIONEERS OF JUDICIAL BEHAVIOR, *supra* note 36, at 1, 31 (explaining the development of political science as a discipline and the evolution of the study of judicial behavior, which at times was “overshadowed by vehement methodological struggles and attendant theoretical battles”).
67. See, e.g., C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947, at 6–9 (1948) (indicating that President Roosevelt responded to a series of 4–5 Supreme Court decisions “preclud[ing] legislative intervention in economic and social affairs” by an unsuccessful attempt to increase the number of judges on the Supreme Court); SUNSTEIN ET AL., *supra* note 59, at 147 (reporting the finding of “striking evidence of a relationship between the political party of the appointing president and judicial voting patterns”). *But see* Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369 (2008) (demonstrating the effect of legal factors that influence justices’ decisions).
68. SEGAL & SPAETH, *supra* note 56, at 86; *see also* Corey Rayburn Yung, *Beyond Ideology: An Empirical Study of Partisanship and Independence in the Federal Courts*, 80 GEO. WASH. L. REV. 505 (2012) (arguing that judges’ political ideology is over-weighted in most empirical studies of judicial decision making and employing additional regression analysis metrics of “partisanship” and “independence” to provide more finely tuned analysis).



intermediate appellate courts “play by far the greatest legal policy-making role in the U.S. legal system.”<sup>69</sup>

Cross concluded that “judicial decision making clearly involves a mix that includes some ideological influence, considerable legal influence, and undoubtedly other factors.”<sup>70</sup> Cross observed that while ideology, life experiences, gender, economic status, religion, and other factors may influence judges to a degree,<sup>71</sup> legal rules “matter greatly” in case outcomes.<sup>72</sup> This proved especially true when courts applied rules and doctrines to threshold, and often determinative, matters of “jurisdiction, standing, mootness, exhaustion of administrative remedies, and the political question doctrine.”<sup>73</sup>

Additional research on federal circuit courts suggests that that judges tend to follow rule of law unless applicable law is unsettled,<sup>74</sup> and only cases with unclear precedent reveal trends based on political ideology and other factors.<sup>75</sup> Other data analyses found that federal circuit courts are appropriately deferential to district court decisions based on the applicable standard of review, another indicator undermining the ideology-outcome correlation.<sup>76</sup> However, other studies conclude that the liberal-conservative attitudinal view of judges serving on three-judge appellate panels predicts voting patterns more strongly in some types of cases than in others, including cases involving the rights of LGBT litigants.<sup>77</sup>

By studying the opinions issued by three-judge appellate panels, researchers further identified decision-making influences grounded in

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69. FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 2 (2007).

70. *Id.* at 177.

71. *Id.* at 75–89.

72. *Id.* at 67.

73. *Id.* at 179.

74. *See, e.g.,* SUNSTEIN ET AL., *supra* note 59, at 5 (observing that when the applicable law is clear judges “will simply implement it,” regardless of their ideology).

75. *Id.* at 17–45.

76. Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 20–21 (2011) (providing an empirical analysis of circuit court decisions that reveals a strong correlation between the level of deference required by a standard of review and the rate of appellate reversal).

77. *See, e.g.,* SUNSTEIN ET AL., *supra* note 59, at 20–21 tbl.2-1 (illustrating that examining voting patterns of judges appointed by Democrat and Republican presidents on twenty-three topics vary greatly on matters involving gay and lesbian rights, affirmative action, and capital punishment, but those voting patterns are much closer on criminal appeals, takings cases, and punitive damages).

institutional structure rather than the attitudinal views of the judges.<sup>78</sup> One team of researchers labeled this phenomenon as “ideological dampening” and “ideological amplification.”<sup>79</sup> Dampening occurs when, for example, a Republican judge with a conservative ideology sits with two Democratic judges with a more liberal perspective on the law.<sup>80</sup> The conservative judge is more likely to vote with the liberal colleagues in that circumstance. Data confirms that “Republican appointees look rather like Democratic appointees when they sit with only Democratic appointees, and Democratic appointees, in the presence of Republican appointees, turn out to look like Republican appointees.”<sup>81</sup> Amplification occurs when all three judges share the same ideology, thereby reinforcing their tendency to vote in a stereotypical fashion.<sup>82</sup>

Other institutional factors empiricists identify include appellate judges’ status and tenure on the court (for example, temporary appointment, new judge, seasoned jurist, or chief judge) and previous judicial experience as influencing judicial opinions.<sup>83</sup> Norms unique to a particular appellate court—for example the tendency not to dissent and the size of the court—may also influence the decision-making process.<sup>84</sup> Empirical data has even linked judges’ eating and break patterns with the degree of mercy shown in those decisions throughout the day.<sup>85</sup>

Data on trial courts is, of course, critical to understanding the extent of judicial bias in the United States. Due to the sheer number of litigants who appear before trial courts and the relatively small

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78. See, e.g., CROSS, *supra* note 69, at 148–77. Cross concludes that “panel effects are enormously important in determining the judge’s vote and the case outcome.” *Id.* at 176–77.

79. SUNSTEIN ET AL., *supra* note 59, at 8–10.

80. *Id.* at 8–9.

81. *Id.* at 54.

82. *Id.* at 9–10.

83. HETTINGER ET AL., *supra* note 59, at 33–34; see also COFFIN, *supra* note 38, at 197 (observing based on personal experience that “judges on the same kind and level of court develop thought patterns peculiar to that particular court” which may include certain “moral judgments, . . . social policy, and sometimes even philosophical convictions”).

84. HETTINGER ET AL., *supra* note 59, at 34–35.

85. Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT’L ACAD. SCI. 6889 (2011) (concluding from extensive study of judicial decisions in parole board hearings that “the likelihood of a favorable ruling is greater at the very beginning of the work day or after a food break than later in the sequence of cases” and explaining how other factors that may influence the judges’ decisions).

number of cases appealed, more “justice” is dispensed by trial level courts than intermediate appellate and state and federal courts of last resort.<sup>86</sup> In addition, the “broad formulations and resulting ambiguity that characterize most higher court rulings, especially those of the Supreme Court,”<sup>87</sup> vest considerable discretion in trial courts to interpret and apply the law. This is especially true when procedural rules have a significant, and even determinative, impact on the case.<sup>88</sup>

Although limited in scope, analysis of trial level court decisions tends to confirm that “to an impressive degree the voting patterns of district court judges do reflect the political values of their appointing presidents.”<sup>89</sup> An analysis of federal trial court decisions through 1996, for example, demonstrated that 79.1% of decisions rendered by judges appointed by Democratic President James Carter resulted in extension of voting rights, while 38.8% of the decisions rendered by Republican President Ronald Reagan appointees extended those rights.<sup>90</sup> Similarly, Carter appointees voted in favor of affirmative action 87.5% of the time compared to 40% by Reagan appointees.<sup>91</sup>

On the perennially controversial topic of abortion, Carter appointees voted pro-choice 76.4% of the time, while Reagan appointees did so 46.1% of the time.<sup>92</sup> Other studies have identified geographical factors that tend to predict judicial voting patterns, frequently focusing on the differences between judges north (more liberal) and south (more conservative) of the Mason-Dixon line, and

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86. In 2012, for example, 271,572 cases were terminated by federal district courts. *Caseload Statistics 2013*, USCOURTS.GOV, tbl.C, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C00Sep12.pdf> (last visited Mar. 21, 2014) (reporting statistics for U.S. District Courts’ “Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2011 and 2012”). Only 57,501 cases were appealed that year. *Id.* at tbl.B (reporting statistics for U.S. Courts of Appeals’ “Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2012 and 2013”).

87. LYLES, *supra* note 25, at 3.

88. Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 448 (2011) (remarking that “the substantive balance between parties—what benefits they can expect from litigation—may be affected by applicable procedure, making it easier or harder to prosecute or defend, or to delay or expedite, an action”).

89. ROBERT A. CARP & C. K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 53 (1983); *see also* ROWLAND & CARP, *supra* note 58, at 21 (updating and confirming their earlier conclusion).

90. LYLES, *supra* note 25, at 219 tbl.7.5.

91. *Id.* at 215 tbl.7.3.

92. *Id.* at 210 tbl.7.1.

the contrast between judges in urban (more liberal) and rural (more conservative) areas.<sup>93</sup>

*b. Empirical Analyses of Decisions Involving LGBT Litigants*

Social scientist and attorney Daniel Pinello analyzed 468 state and federal appellate court decisions rendered in the 1980s and 1990s that involved LGBT litigants.<sup>94</sup> He isolated factors that both sustain and challenge the notion that the judges rendering these decisions embraced judicial independence as a core value.

Pinello concluded that trial and intermediate appellate courts respected precedent and applied it when available.<sup>95</sup> Framed in judicial independence terms, these courts adhered to the “rule of law” if one existed. Pinello also observed that judges seemed to respect the facts of each case when applying the law.<sup>96</sup>

Pinello’s conclusions contain a number of points affirming the attitudinal model of judicial decision making. For example, female<sup>97</sup> and racial minority<sup>98</sup> judges produced many of the decisions favoring LGBT litigants. Jewish judges rendered more decisions favorable to LGBT litigants and Catholic judges rendered more unfavorable decisions.<sup>99</sup> Younger judges issued more pro-LGBT decisions than their more seasoned counterparts.<sup>100</sup> Political ideology also appeared highly correlative to outcome, as judges appointed by Democratic presidents were significantly more receptive to the equality claims of LGBT litigants than Republican appointees.<sup>101</sup>

Other researchers studied twenty-two U.S. Circuit Court decisions involving lesbian or gay litigants decided between 1980 and 2005. They concluded that individual judges appointed by Democratic (and thus arguably more liberal) presidents voted in favor of homosexual litigants fifty-seven percent of the time.<sup>102</sup> Their arguably more conservative Republican counterparts did so in only sixteen percent of

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93. ROWLAND & CARP, *supra* note 58, at 58–86.

94. DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 76–93 (2003).

95. *Id.* at 79, 82, 150.

96. *Id.* at 79. It is not clear whether Pinello’s methodology specifically screened for the possible judicial selectivity of facts or issue selection, two common threats to judicial independence described above.

97. *Id.* at 88.

98. *Id.* at 87.

99. *Id.* at 88–91.

100. *Id.* at 91.

101. *Id.* at 114–15, 151–52.

102. SUNSTEIN ET AL., *supra* note 59, at 20–21, 57 tbl.2-1.

the cases.<sup>103</sup> In addition, a three-judge Democratic panel was seven times more likely to vote in favor of a lesbian or gay party than a panel of three Republicans.<sup>104</sup> These data represented the greatest gap between liberal and conservative judges in all twenty-three categories of cases examined, including highly controversial matters such as affirmative action, abortion, and capital punishment. The researchers observed:

Hence, we find extremely strong evidence of ideological voting—the strongest evidence, in terms of raw percentages, of all our case categories. Indeed, the party difference is so marked that it is statistically significant even with this small sample of cases. Perhaps this is unsurprising, because the issue of gay and lesbian rights causes intense political conflict in general.<sup>105</sup>

### 3. Additional Theories of Judicial Decision Making

Existence of empirical data has not convinced all modern theorists that the attitudinal or strategic models of judicial decision making are sound. Judge Richard Posner, for example, rejects theories of legalism (his term roughly analogous to formalism), extreme attitudinalism, and other judicial decision-making theories in favor of casting judges as pragmatists. While recognizing “that there is a pronounced political element in the decisions of American judges,”<sup>106</sup> Posner also concludes that “constrained pragmatist” is the term “that best describes the average American judge at all levels of our judicial hierarchy and yields the greatest insights into his behavior.”<sup>107</sup>

According to Judge Posner, the pragmatic judge (1) considers the consequences of his decision not only to the parties in the case but also the broader institutional and societal consequences;<sup>108</sup> (2) rejects the unsupported claims of legal realists (formalists) that legislatures are capable of regularly altering law to keep up with changing times;<sup>109</sup> (3) astutely identifies false claims that two equally valuable competing interests are at stake;<sup>110</sup> (4) searches for the discernible

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103. *Id.*

104. *Id.*

105. *Id.* at 57. Because the sample size was small, the researchers could not determine whether amplification or dampening of political ideology occurred due to the specific composition of the three-judge panels when, for example, two Democrats sat with a Republican, or vice versa. *Id.*

106. POSNER, *supra* note 65, at 369.

107. *Id.* at 231.

108. *Id.* at 238, 242–43.

109. *Id.* at 240.

110. *Id.* at 242–43.

purpose of the rule being applied when the scope of application is uncertain;<sup>111</sup> (5) favors deciding cases on narrow rather than broad grounds, especially “in the early stages of the evolution of a legal doctrine”;<sup>112</sup> and (6) recognizes that legal reasoning is not distinguishable from “ordinary, everyday reasoning” that takes into account the actual benefits and costs of a decision and moves beyond the parties’ rhetoric to examine and rely upon the facts and data presented in the case.<sup>113</sup> While recognizing the validity of labeling the U.S. Supreme Court as a political court, Judge Posner posits that the justices are still pragmatists, as they often appear driven by the political *consequences* of their decisions.<sup>114</sup>

After exploring much (but by no means all) of the vast literature on the realism-formalism debate and other schools of thought, the view articulated by Professor Brian Tamanaha proves particularly compelling. Tamanaha writes that “the story about the legal formalists is highly an invention, and legal realism is substantially misapprehended.”<sup>115</sup> Stated simply, most judicial decision making occurs near the middle of a spectrum anchored at opposite ends by realism and formalism. Judicial decisions are also greatly informed by the unique facts and law of each case. Tamanaha employs the term “balanced realism”<sup>116</sup> to describe what is perhaps the most common approach to judicial decision making, past and present. Tamanaha concludes:

Judges are unique individuals with bents, biases, and various strengths and limitations, as well as differences in moral and political views, and differing views of judging (beyond a common core). These aspects . . . combine to create a zone of

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111. *Id.* at 245.

112. *Id.* at 246.

113. *Id.* at 248.

114. *Id.* at 269.

115. TAMANAHA, *supra* note 54, at 3. Tamanaha deconstructs the history and rationales that have long been associated with the formalist and realist views of American law and makes a strong case for blurring the lines that separate these allegedly disparate periods of U.S. legal history. He rejects the claim “that judges in the ‘formalistic age’ reasoned in a bizarrely mechanical manner unlike judges before or after them,” and makes an equally compelling case that “[v]irtually every one of the core insights about judging now associated with the realists was prominently stated decades before, often by historical jurists.” *Id.* at 43, 79.

116. *Id.* at 8; *see also* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 213 (2009) (explaining that both formalism and realism are entrenched in the legal system, but “neither is adequate to describe the ways in which lawyers, judges, or legal academics reason, interpret, or elaborate law”).

uncertainty and variation in judicial decision making. It has always been so. Nonetheless, legal rules frequently work and judges frequently render rule-bound decisions.<sup>117</sup>

4. In Their Own Words: How Judges Decide Cases

*“Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.”*<sup>118</sup>

*“If it were only that simple.”*<sup>119</sup>

a. *Acknowledging the Obvious*

Insightful explanations of how judges decide cases are found in the words of the jurists themselves.<sup>120</sup> A common judicial revelation is that each jurist holds a worldview molded from his or her life experiences and the shared perspectives of family, friends, colleagues, and others with whom they interact. Supreme Court Justice Oliver Wendell Holmes famously explained:

“The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”<sup>121</sup>

Benjamin Cardozo similarly acknowledged that every judge has an underlying philosophy,<sup>122</sup> and despite valiant efforts to see things objectively, “we can never see them with any eyes except our own.”<sup>123</sup> To the contrary, “[d]eep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habit and convictions, which make the man, whether he be litigant or judge.”<sup>124</sup>

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117. TAMANAHA, *supra* note 54, at 187.

118. Thomas G. Saylor, *On the Nature of Judging: First Annual Jurist in Residence Lecture*, 20 WIDENER L.J. 681, 682 (2011) (quoting Socrates).

119. *Id.* (presenting Judge Saylor’s reflection on Socrates’ observation).

120. *See generally* JUDGES ON JUDGING, *supra* note 22 (containing speeches and essays from historically significant and contemporary judges).

121. OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (1881).

122. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12 (1921).

123. *Id.* at 13.

124. *Id.* at 167.

Affirming the insights of U.S. Supreme Court Justice Felix Frankfurter, a contemporary state supreme court justice explained the process this way:

[J]udging is a craft, not a science. In performing their work, judges bring to bear their experience and practical knowledge, honed by habit and informed by common understanding. Although the precise manner in which they do this is difficult to describe, the end of the endeavor is not. Judges, wrote Justice Frankfurter, are called upon for “allegiance to nothing except the [effort], amid tangled words, amid limited insights, . . . to find their path through precedent, through policy, through history, . . . to the best judgment that poor fallible creatures can arrive at in that most difficult of all tasks, the [achievement of justice] between man and man, between man and state, through reason called law.”<sup>125</sup>

Judge Diane S. Sykes reframed these truisms succinctly: “it goes without saying that judges do not shed their life experiences when they put on the robe.”<sup>126</sup>

The candid reflections of the judges quoted above are confirmed by empirical evidence. A survey of federal district court judges revealed that 6.6% of respondents “often” and fifty-one percent “sometimes” felt that their personal attitudes and values affected their discretionary judgments.<sup>127</sup> An even higher number—9.2% “often” and 64.1% “sometimes”—felt that *other* judges’ decisions were affected by those judges’ personal attitudes and values.<sup>128</sup> As explained in Part I.B.4.b, some judges reject the portraits painted by this study, or at least call for a more nuanced understanding of the many factors affecting the judicial decision-making process.

*b. Commitment to Neutrality: Personal and Institutional Restraints*

While acknowledging that “moral values, ideas of social utility, and philosophical insights occasionally play a significant role” in judicial decision making, Judge Frank Coffin believed that “a case on point or clearly analogous, analysis of the evidence . . . , a procedural or jurisdictional requirement, a compelling public policy, a close

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125. Saylor, *supra* note 118, at 696 (quoting Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 905 (1953)).

126. Sykes, *supra* note 60, at 1388.

127. LYLES, *supra* note 25, at 21 tbls.2 & 3. The survey was conducted in 1992 and 1993 and over sixty percent of federal district judges responded. *Id.* at 275.

128. *Id.* at 21 tbls.2 & 3.



reading of legislative history, and considerations of institutional appropriateness will in the end decide most cases.”<sup>129</sup>

Judge Sykes echoed Judge Coffin’s sentiment. “*Of course* judges have life experiences and philosophical views that affect their understanding of the cases they must decide, and some of these may be linked to gender, race, or ethnicity,”<sup>130</sup> Judge Sykes posits. “Good judges will constantly check for these influences and deal with them judiciously, consistent with the obligations of the judicial oath of office.”<sup>131</sup> She opines that judges accept their assigned role of rendering decisions “based on factors external to themselves: the legally salient facts of the case and the most faithful reading of the constitution and laws, applicable precedent, and accepted principles of legal interpretation.”<sup>132</sup>

Despite the challenges of confronting inherent and perhaps even unconscious biases when deciding cases, the vast majority of judges who have voiced an opinion on the judicial decision-making process appear to agree with Judges Coffin and Sykes: judicial officers commit to resolving each issue and case as neutrally as humanly possible. Judges also recognize and respect various internal and external constraints on their decision-making authority.

As Judge Cardozo explained, although judges “cannot transcend the limitations of the ego and see anything as it actually is, . . . the ideal is one to be striven for within the limits of our capacity.”<sup>133</sup> And limitations on exercises of judicial ego do exist, even in the ubiquitous realm of judicial discretion. Cardozo explained:

The judge, even when he is free, is not wholly free . . . . He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, [and] disciplined by system, and subordinated to “the primordial necessity of order in the social life.”<sup>134</sup>

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129. COFFIN, *supra* note 38, at 196; *see also id.* at 199–203 (expanding on the role of judges’ values and background in judicial decision making).

130. Sykes, *supra* note 60, at 1390.

131. *Id.*

132. *Id.* at 1388.

133. CARDOZO, *supra* note 122, at 106.

134. *Id.* at 141 (quoting 2 FRANCIS GENY, *METHODE D’INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF* § 200 (1899) (quoted to and translated by Benjamin N. Cardozo)).

Like Judge Cardozo, Judge Alex Kozinski readily acknowledges that judges at every level possess considerable discretion, but he also identifies three “very significant restraints” on the exercise of that discretion.<sup>135</sup>

The first constraint is self-respect. “Judges have to look in the mirror at least once a day, just like everyone else,” Judge Kozinski explains. “[T]hey have to like what they see.”<sup>136</sup> Judges who choose to abandon principle to reach a result will have to do so by deliberate choice, a choice that, by and large, judges tend not to make.<sup>137</sup> The second constraint is imposed by judicial colleagues. Trial judges face review by three-judge appellate panels, and court of appeals judges must persuade others to join their opinions.<sup>138</sup> When a litigant seeks *en banc* review, the writing judge’s “shortcuts, errors and oversights are mercilessly paraded before the entire court.”<sup>139</sup> Flawed opinions also invite stinging dissents that highlight the writing judge’s shortcomings.<sup>140</sup> The final constraint “often overlooked but awesome nonetheless” is the political reaction to decisions, either via legislation invalidating the opinion or removal of judges from office.<sup>141</sup>

Judge Coffin identified the near-universal requirement that judges render public, written decisions as another institutional constraint on judicial decision making.<sup>142</sup> When reciting the relevant facts, applicable law, legal logic, and overriding policy supporting the resolution of a case a judge may realize that the result “looks different when dressed up in written words and sent out into the sunlight.”<sup>143</sup> Judges may discover that what appeared to be sound reasoning supporting a particular outcome is seriously flawed, and the opinion “simply ‘won’t write.’”<sup>144</sup>

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135. Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in JUDGES ON JUDGING, *supra* note 22, at 115, 116.

136. *Id.*

137. *Id.*

138. *Id.* at 116–17; *see also* COFFIN, *supra* note 38, at 58 (observing that “almost everything an appellate judge is called upon to do he must do with his colleagues”).

139. Kozinski, *supra* note 135, at 117.

140. *Id.*

141. *Id.*

142. COFFIN, *supra* note 38, at 57; *see also* Saylor, *supra* note 118, at 681–82 (explaining “that in the area of constitutional interpretation . . . a court makes difficult choices among competing values, and [then is] obliged by tradition and compelled by institutional necessity, to supply reasons for such choices”).

143. COFFIN, *supra* note 38, at 57.

144. *Id.*

Judge Coffin concluded that “[t]he act of writing tells us what was wrong with the act of thinking.”<sup>145</sup> An opinion is defensible only if it “marshals facts and precedents, logic and analogy, and broad policy implications of the decision in contemporary society so that the result is seen as fair, expectable, and perhaps even inevitable.”<sup>146</sup>

Judge Jack B. Weinstein echoed Judge Coffin’s observations. “Ultimately,” Judge Weinstein states, “it is the trial judge’s conscience, exercised under the constraints of our rule of law, that guides the pen writing an opinion justifying a judgment.”<sup>147</sup>

Judge Patricia Wald identified additional constraints on judicial decision making, including “the formidable Federal Rules of Civil Procedure, Criminal Procedure and Evidence,” and “[p]ermanently recorded and widely disseminated opinions [that] also make for responsible judgments, as do the oral processes of court arguments and the scrutiny of a regular and alert bar trained in the same legal culture as the judges.”<sup>148</sup> Judge Wald also characterized “[t]he press and academic criticism” as additional and “powerful tools to make a judge think hard about her rulings.”<sup>149</sup>

*c. Activism*

*“History has taught . . . that political parties support judicial independence as long as their interests are the same, but as soon as their interests diverge, they decry judges as activists overreaching their power.”*<sup>150</sup>

Claims of judicial activism have long been a subject of heated political discourse,<sup>151</sup> but in recent years have reached a fevered pitch. Former Supreme Court Justice Sandra Day O’Connor posits that “the breadth and intensity of rage currently being leveled at the judiciary

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145. *Id.*; see also Weinstein, *supra* note 88, at 453–54 (concluding that a “candid statement of the reasoning supporting the trial court’s decision is always required” and that “[m]endacity in twisting the facts, evidence, history, or legal background to arrive at a conclusion is not acceptable”).

146. COFFIN, *supra* note 38, at 196.

147. Weinstein, *supra* note 88, at 454.

148. Wald, *supra* note 21, at 232.

149. *Id.* at 231.

150. BAER, *supra* note 33, at 77.

151. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (criticizing the Supreme Court for continuously revising the Constitution while claiming only to be interpreting it and arguing that the Court should exercise restraint by employing an “original internationalist” approach).

may be unmatched in American history.”<sup>152</sup> Professor Friedman observed that the newest twist on judicial activism claims is that “for the first time in American history, the Supreme Court’s power of judicial review has come under siege simultaneously from both sides of the ideological spectrum.”<sup>153</sup>

Similarly, the ability of political operatives to effectively harness public unrest about the power of the judiciary has reached new heights. The “judicial activism” mantra became the focal point for the well-orchestrated, well-financed, and successful fall 2010 campaign to oust three Iowa Supreme Court justices who, along with four of their colleagues, had unanimously ruled that the state’s constitution required marriage equality for same-sex couples.<sup>154</sup> No other Iowa Supreme Court justice, appellate judge, or district judge had lost a retention bid since 1962 when Iowa adopted its current judicial selection and retention system.<sup>155</sup> Election experts offered assurance that the rule of law was not endangered by the results of a single election in Iowa,<sup>156</sup> but they also tended to agree that “[w]hat happened in Iowa cannot help but give a temporary chill to other courts when faced with such a highly charged political issue as gay marriage.”<sup>157</sup> Efforts to oust a fourth Iowa Supreme Court justice who joined the court’s marriage equality decision proved unsuccessful.<sup>158</sup>

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152. Sandra Day O’Connor, Op-Ed., *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.
153. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 7 (2009); *see also* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005) (critiquing courts from a liberal perspective); MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005) (critiquing courts from a conservative view point).
154. Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send a Tremor Through the Judicial Retention System*, 95 A.B.A. J. 56 (2011); Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715 (2011).
155. Curriden, *supra* note 154, at 56.
156. *Id.* at 56–57 (quoting a number of professors and judges including New York University School of Law’s Professor Berry Friedman and the Indiana Supreme Court’s Chief Justice Randall Shepard).
157. *Id.* at 56 (quoting Professor Friedman).
158. Beth Dalbey, *Election 2012: Iowans Reverse Trend, Retain Supreme Court Justice Who Ruled on Same-Sex Marriage*, WEST DES MOINES PATCH (Nov. 7, 2012, 6:31 AM), <http://westdesmoines.patch.com/groups/politics-and-elections/p/election-2012-judicial-retention-vote> (reporting that Judge David Wiggins received a fifty-four percent approval vote, compared to approximately seventy-four percent approval vote garnered by each of the three justices appointed to replace the justices voted out of office in 2010 due to their marriage-equality decision).

The heart of the judicial activism debate lies in the fact that “[o]ver the course of two centuries, the Supreme Court has successfully asserted that it and it alone has the final say on the constitutionality of the elected branches of national government and all branches of state government.”<sup>159</sup> The highest courts of the various states have similarly assumed the role of ultimate arbiters of laws enacted by elected legislators and decisions made by elected members of the executive branch. State and federal courts also routinely review ballot initiatives for constitutional and procedural flaws, thus imbuing the judiciary with powers superior to “the people” in whom the U.S. and state constitutions purport to vest the greatest power.<sup>160</sup> “Understandably, this strikes many people as a peculiar arrangement for a nation that claims to be a democracy.”<sup>161</sup> Advocates of “judicial restraint” predict dire consequences, including the emasculation of fundamental doctrines and undermining of separation of powers if activism is left unchecked.<sup>162</sup>

### 1. In Search of a Definition

Terms such as *activist judges* and *judicial activism* belie a single definition. One widely accepted meaning is “deciding a case contrary to the plain meaning of the Constitution [or other applicable law] in order to promote the judge’s political preferences.”<sup>163</sup> Some scholars

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159. FREDERICK P. LEWIS, *THE CONTEXT OF JUDICIAL ACTIVISM: THE ENDURANCE OF THE WARREN COURT LEGACY IN A CONSERVATIVE AGE* 5 (1999). Chief Justice John Marshall’s decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which the Court declared itself superior to the supposedly co-equal legislative and executive branches of federal government on issues requiring constitutional interpretation, is often cited as among the earliest and most enduring examples of judicial activism. *See, e.g., id.* at 8. Sharply contrasting views of the proper approach to judicial review are provided in the classic works of John Hart Ely and Raoul Berger. *Compare* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (arguing that the Court functions legitimately when it strikes down laws or practices that are designed to allow those in power to hold onto that power by “choking off the channels of political change” or when representatives of the majority disadvantage a minority out of hostility or prejudice), *with* BERGER, *supra* note 151 (advocating for courts to rely more heavily on the original intent of the framers of the Constitution and contending that the Supreme Court has rewritten in the Constitution while claiming merely to be interpreting it).

160. *See generally* Lori J. Rankin, *Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right’s Campaign Against Lesbians and Gay Men*, 62 U. CIN. L. REV. 1055 (1994).

161. LEWIS, *supra* note 159.

162. Wallace, *supra* note 22, at 214.

163. KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 38 (2006).

have used the concept “simply to characterize a Court willing to use its authority to engage in judicial review in an assertive manner,” with such assertiveness implying “a considerable degree of doctrinal pronouncement that is innovative, at least in the sense that it has not been explicitly pronounced before.”<sup>164</sup> Others define activism by identifying a number of outcomes that allegedly prove that activism has occurred.<sup>165</sup> Judicial activism has also been defined—and defended—as “a form of creative constitutional development,”<sup>166</sup> and an inappropriate embrace of the concept of a “living” or “growing” Constitution.<sup>167</sup> On the other side, judicial activism has become “a code word used to induce public disapproval of a court action that a politician opposes, but is powerless to overturn.”<sup>168</sup> Such incantations affect the public “on an emotional level without provoking any reasoned discourse among them.”<sup>169</sup>

## 2. Flaws Inherent in Contemporary “Activism” Label

Multiple flaws pervade the ubiquitous use of the term “judicial activism” to condemn the judicial decision-making process in general and a specific judge’s controversial opinion in particular. Part I.C.2 focuses on just three of those flaws.

### *a. Judges Must Judge*

By definition, judges must exercise judgment and often do so in situations where applicable law is ill defined or nonexistent. Judges must apply both precise legal rules offering bright-line tests and intentionally elastic equitable principles featuring vague balancing tests.<sup>170</sup> And regardless of the source of law at issue—legislative,

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164. LEWIS, *supra* note 159, at 7.

165. See, e.g., Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236 (1983) (identifying six scenarios in which activism occurs, including the alteration of earlier precedent, interpretation of constitutional provisions in a manner contrary to the clear intention of the drafters, and establishing policy rather than leaving that role to other government agencies).

166. LEWIS, *supra* note 159, at 89.

167. Wallace, *supra* note 22, at 212.

168. William Wayne Justice, *The Two Faces of Judicial Activism*, in JUDGES ON JUDGING, *supra* note 22, at 42, 42; see also COFFIN, *supra* note 38, at 200 (observing that a judge is often pigeonholed as a model of “judicial restraint” or of “judicial activism,” even though the public’s understanding of how judges actually decide cases “seems to have originated in myth and to be perpetuated by convention”).

169. Justice, *supra* note 168.

170. See Weinstein, *supra* note 88, at 453 (acknowledging that a “trial court is always concerned with the conflict between strict law and flexible equity,” as “[a]nalytical purity in chambers favors the former; empathy

constitutional, regulatory, or case precedent—the legal authorities governing any given case are often inherently ambiguous and legitimately capable of multiple interpretations. As former D.C. Circuit Chief Judge Patricia M. Wald aptly observed, “Dealing in words is a dangerous business . . . . Dealing in long, vague, fuzzy-meaning words is even more dangerous business, and most of the words The Law deals in are long and vague and fuzzy.”<sup>171</sup>

Justice Felix Frankfurter’s comments echo Judge Wald’s sentiment. He characterized the constitutional guarantees of due process and equal protection as “vague and admonitory” and of “dubious . . . appropriateness for judicial enforcement.”<sup>172</sup> Judge Learned Hand similarly admitted to not knowing “what the doctrine is as to the scope” of the Due Process Clauses located in the Fifth and Fourteenth Amendments.<sup>173</sup> In Judge Benjamin Cardozo’s experience, “[o]bscurity of statute or of precedent or of customs or morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function.”<sup>174</sup>

More recently, the dilemma was framed in these terms: “Frequently the law is clear, and judges should and will simply implement it . . . . But what happens when the law is unclear? In that event, it is hopelessly inadequate to ask judges to ‘follow the law.’”<sup>175</sup> Lack of clarity in the existence and application of law has been a recurring issue in cases involving LGBT litigants due to the relatively recent phenomenon of individuals willing to (or forced to) acknowledge their minority sexual orientation status and identity.

Indeed, in LGBT rights and other cases, litigation is often initiated *because* the respective legal rights and duties of the litigants are unclear under existing law. But lack of settled law does not justify a court’s decision to decline jurisdiction over a contentious and politically charged matter. To the contrary, judges “simply are not in a position to refuse to respond to proper cases instituted by

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in the courtroom for individuals living in an imperfect world leans toward the latter”).

171. Patricia M. Wald, *Commencement Address*, 32 CATH. U. L. REV. 1, 8 (1982) (quoting FRED RODELL, *WOE UNTO YOU, LAWYERS!* 39 (Berkeley ed., 1980)).

172. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 229, 237 (1955). Lack of clarity extends beyond constitutional law to statutory and regulatory law.

173. LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES*, 1958, at 55 (1960).

174. CARDOZO, *supra* note 122, at 128.

175. SUNSTEIN ET AL., *supra* note 59, at 5.

appropriate parties under provisions of statutory or constitutional law.”<sup>176</sup>

Similarly, the facts of a case rarely present themselves in the tidy and uncontroverted manner suggested by courts’ written disposition of cases. A judge must often choose between sharply contrasting versions of the events resulting in the litigation. At the trial level, courts are intentionally vested with significant discretion to assess the relative credibility of the competing versions of reality. Appellate courts may revisit the trial court’s credibility decisions to determine whether the factual findings are supported by the evidence, albeit under the deferential “abuse of discretion” standard.

*b. Judges Must Constrain Legislators*

Judges play a unique role in the checks and balances embedded in the U.S. and state constitutions. Contrary to the popular argument that judges who strike down legislation inflict severe injuries on a democratic form of government, judges are *not* charged with advancing or imposing the will of the majority.<sup>177</sup> That role is assigned to legislators and elected members of the executive branch.

As declared by the U.S. Supreme Court in *Marbury v. Madison*,<sup>178</sup> the judicial branch is entrusted with the much more challenging task of preventing the “tyranny of the majority” being imposed via legislative enactments and other government action on minorities who are entitled to enjoy the privileges and protections that the U.S.

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176. PHILLIP J. COOPER, *HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS* 328 (1988) (reflecting on court intervention in matters of public housing, desegregation, prison, and mental health placements).

177. *See, e.g.*, Brian Tashman, *Vander Plaats: Entire Iowa Supreme Court Must Resign*, RIGHTWINGWATCH.ORG (Dec. 8, 2010, 5:08 PM), <http://www.rightwingwatch.org/content/vander-plaats-entire-iowa-supreme-court-must-resign> (explaining Bob Vander Plaats’s argument that judges who disregard “the will of the people” harm democracy and should be voted out of office). Vander Plaats chaired the “Iowa for Freedom” movement that resulted in three Iowa justices losing their retention elections due to the Iowa Supreme Court’s unanimous decision that a ban on same-sex marriage violated the Iowa Constitution. *Id.* National groups advancing the same argument in Iowa included, among others, The American Family Association, The National Organization for Marriage, and The Family Research Council. *See* Patrick Caldwell, *Disorder in the Court*, AM. PROSPECT, Oct. 2011, at 44, 48.

178. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326 (1819) (expounding upon Supreme Court’s power of review). The power of the judiciary to review and invalidate the acts of legislatures and executives has been controversial “[t]hroughout history” due to the “chief complaint . . . that it interferes with the right of the people to govern themselves.” FRIEDMAN, *supra* note 153, at 5.



Constitution promises to all.<sup>179</sup> Accordingly, “the judicial branch is responsible for resolving disputes between citizens and their government, including claims by citizens that the government has violated their constitutional rights.”<sup>180</sup> The courts will continue to fulfill that critical role absent the Supreme Court’s reversal of *Marbury* or the equally unlikely event of a Constitution amendment stripping courts of the power to review legislative and executive acts.<sup>181</sup>

Though often subject to criticism, *Marbury*’s holding is not “undemocratic.” Looking back to the genesis of U.S. law deeply embedded in the English system, it is obvious that the United States never adopted the “one-man, one-vote on most of the crucial issues of society’s survival.”<sup>182</sup> Rather, the United States has “a rule of law growing out of a nine-hundred-year Anglo-American tradition that gives us a total process of institutional balance of which one-man, one-vote is an integral part.”<sup>183</sup> As a result, the form of “democracy” employed in the United States “is really remarkable for its

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179. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) (explaining that, although majorities rule in democratic forms of government, there are nonetheless “areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny”); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139 (1990) (describing the conflict inherent in the United States between self-governance in which majorities rule and constitutional protections for “areas of life in which the individual must be free of majority rule”). Compared to federal courts in which judges are appointed for life, the role of the judiciary in protecting citizens from the tyranny of the majority is not quite as controversial in state systems because judges are elected or subject to retention votes and thus ultimately answerable to the electorate for their decisions.

180. Ternus, *supra* note 10, at 480; see also Sandra Day O’Connor, Op-Ed., *Take Justice Off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9 (opining that “the judiciary, unlike the legislative and the executive branches, is supposed to answer only to the law and the Constitution” and is not accountable to campaign donors or ideological groups).

181. See *United States v. Munoz-Florez*, 495 U.S. 385, 396–97 (1990) (observing that “the principle that the courts will strike down a law when Congress has passed it in violation of such a [constitutional] command has been well settled for almost two centuries”); see also *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1432 (2012) (citing *Munoz-Flores* for the principle that courts have the power “to resolve the constitutionality or propriety of the act of another branch of Government”).

182. RICHARD NEELY, *HOW COURTS GOVERN AMERICA* 140 (1981).

183. *Id.*

nondemocracy, that is, its protection of minorities, dissenters, incompetents, misfits, and social outcasts.”<sup>184</sup>

*c. Judges Must Facilitate the Law’s Evolution*

The principles of equality and various personal fundamental freedoms are deeply embedded in the U.S. and state constitutions. These promises and protections foster significant individual autonomy, which in turn produces myriad fact patterns to which established legal authorities must be applied. Over time, individual and societal change necessitates the transformation of law itself.<sup>185</sup> Surely the framers of the U.S. Constitution and the authors of the Fourteenth Amendment could not imagine the concept of “equal protection” being applied to women, much less to lesbians, gay men, and transgender individuals. As Roscoe Pound explained, mechanical application of the law results in its “petrification,” inappropriately stifling “independent consideration of new problems and of new phases of old problems.”<sup>186</sup>

## II. JUDICIAL INDEPENDENCE AND LGBT LITIGANTS

### *A. Possible Degrees of Judicial Independence*

It is impossible to calculate precisely the degree of judicial independence in any judicial decision. Despite voluminous empirical data on judicial decision making, only the judge who rendered the decision knows what truly informed his or her decision in that particular case. Even then, unconscious factors may have influenced the process.<sup>187</sup>

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184. *Id.* at 140–41; *see also* COFFIN, *supra* note 38, at 215–21 (refuting the argument that the judicial branch is “undemocratic”). Judge Richard Posner takes this logic a step further, arguing that the prevailing assumption that populist legislatures only act “with the consent of the governed” is unrealistic. Richard A. Posner, *What Am I, A Potted Plant?: The Case Against Strict Constructionism*, in JUDGES ON JUDGING, *supra* note 22, at 223, 225. To the contrary, Judge Posner doubts that the legislative branch routinely reflects majority views when it enacts legislation. Speaking from personal experience, Judge Posner states that his preferred candidates sometimes fail to be elected, and that the winning candidates for which he voted often enacted legislation that he disfavors. And “[g]iven the effectiveness of interest groups in the political process,” Judge Posner adds, “much of this legislation probably didn’t have the consent of a majority of citizens.” *Id.*

185. *See generally* Posner, *supra* note 184, at 193.

186. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908).

187. *See* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994) (opining “that all judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decision making process”).

Relative assessments of judicial independence can be attempted by identifying the model of judicial decision making that the judge appears to have embraced when rendering the decision (e.g., pragmatist, oracle, balanced realist, etc.). One can then attempt to gauge how near or far that model is from the ideal of judicial independence.

Determining the judicial decision-making model or models the judge employed in a particular case is admittedly an inexact exercise.<sup>188</sup> Nonetheless, in many cases the judge's attitude regarding the dispute at hand, the state of the law, and the litigants is revealed in the language of the decision, the judge's framing (or re-framing) of factual and legal issues, the acceptance or rejection of evidence, and the judge's citation to public policy, religious principles, general mores, popular opinion, and cultural norms. In appellate cases, dissenting and concurring opinions often provide critical insights on both the expressed and unexpressed rationales for the majority's decision.

Ranking the models of judicial decision making relative to judicial independence is also a challenging task. The list in Table 1, which assigns ranks to each model from most to least independent, works within the confines of this Article, although empiricists and other scholars who explore judicial decision making may disagree with the short-hand definitions assigned each model or the relative position of each model.

1	<b>Formalism</b>	Judge mechanically applies facts to established rule(s) of law, rendering decision free of judicial bias.
2	<b>Balanced Realism</b>	Judge renders decision informed primarily by unique facts and law of the case, although factors such as political ideology may influence the decision; judge is aware of potential biases and tries to control for them.
3	<b>Constrained Pragmatism</b>	Judge decides cases on narrow grounds, especially when law is uncertain or evolving, considering impact on institutions and society as well as parties.
4	<b>Realism</b>	Judge determines outcome first, then selects facts and laws that support judge's desired outcome.

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188. In a perfect world the evaluator would possess an encyclopedic knowledge of the "rule of law" that was (or should have been) applied in the case, conduct a painstaking review of all evidence to determine whether the court made appropriate weight and credibility determinations, and be able to consider the decision in light of the entire body of decisions rendered by the judge. Because we do not live in a perfect world, the system described in Part I has been employed.

5	<b>Pragmatism</b>	Judge gives equal or greater weight to the potential overall impact of decision on institutions and society rather than securing just result for the litigants in the case or strictly adhering to precedent. <sup>189</sup>
6	<b>Attitudinal</b>	Judge decides case based on ideological attitudes and personal values including religious and political influences.
7	<b>Strategic</b>	Appellate judge votes in a manner that advances the jurist's larger goals, for example, by trading his or her vote in a case about which the judge does not feel strongly to secure a colleague's vote on a case of greater importance to the judge; strategic model may also be employed by agreeing on a second (or third) favorite resolution of a case to avoid an outcome the judge dislikes even more, even though the judge believes the decision in which he or she is concurring is flawed.
8	<b>Oracle</b>	Judge divines result of case from largely common law "mystical body of permanent truths." <sup>190</sup>

Table 1: Judicial decision-making models ranked closest (1) to furthest (8) from judicial independence.

While these definitions provide one tool for helping us understand why judges render specific decisions, all judicial decision-making models below constrained pragmatism on Table 1 can arguably fall so far short of the ideal of judicial independence that their relative rankings are not particularly meaningful.

### *B. Demonstrative Failures of Judicial Independence*

Professor Rivera employed a double entendre when characterizing U.S. judges who decided cases affecting LGBT equality prior to 1980 as "straight-laced."<sup>191</sup> No data exist about the sexual orientation of these judges, but it is logical to conclude that the vast majority, and perhaps all of them, were heterosexual, or, in the vernacular, *straight*.<sup>192</sup> In addition, these judges often personified the term

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189. This categorization of pragmatism is not intended to suggest that judges should never consider the larger impact of their decisions, especially in cases where the law is unclear or evolving. But it does suggest that courts should not routinely sacrifice the rights of litigants in an effort to shape society and institutions in the manner desired by the judge.

190. WHITE, *supra* note 37, at 10.

191. Rivera I, *supra* note 1, at 799. Also note that most cases were decided by judges rather than juries because they involved domestic relations matters, constitutional challenges, or both.

192. Cf. Juliet Eilperin, *First Gay U.S. Appeals Judge Confirmed*, WASH. POST, Sept. 25, 2013, at A2 (noting that just seven openly gay judges

*straitlaced*,<sup>193</sup> as they routinely relied on puritanical religious and moral codes condemning homosexuality as determinative of the legal issues before them.<sup>194</sup> The judges readily embraced an attitudinal model of decision making by relying on and reinforcing negative stereotypes of non-heterosexual litigants. The ideal of judicial independence—the objective evaluation of the specific facts of the case and the legal authorities that would likely command a different result for non-LGBT litigants—was seriously damaged by this approach.

Historically, judges characterized gay and lesbian individuals as undesirable “others” whose presumed sexual perversion, criminal propensities, and mental instability warranted disenfranchisement not only from legal rights and benefits but from basic dignity and respect as well.<sup>195</sup> Regardless of the evidence actually adduced at trial, automatic condemnation of homosexuals by judicial officers was the norm. The attitudinal model was particularly evident in domestic

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had been confirmed as federal district judges prior to Hughes’s appointment).

193. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1232 (11th ed. 2003) (defining the term to mean “excessively strict in manners, morals, or opinion”); see also *Straitlaced Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/straitlaced> (last visited Mar. 23, 2014) (offering words like “Victorian” and “puritanical” as synonyms).

194. Judges often cited their state’s sodomy laws as proof that a gay or lesbian litigant was automatically a criminal and thus unworthy of equal rights under the law. *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995), is a case in point. Sharon Bottoms was raising her son with her female partner when Sharon’s mother sued for custody. The trial judge awarded custody to the grandmother and opined: “I will tell you first that the mother’s conduct is illegal. It is a Class 6 felony in the Commonwealth of Virginia. I will tell you that it is the opinion of this Court that her conduct is immoral. And it . . . renders her an unfit parent.” *Id.* at 109 (Keenan, J., dissenting) (quoting the trial court opinion) (internal quotations omitted). The Virginia Supreme Court affirmed, reiterating that the “[c]onduct inherent in lesbianism is punishable as a . . . felony.” *Id.* at 108 (majority opinion). While the often contentious relationship of legality and morality is beyond the scope of this article, it is worth noting that no evidence was presented in *Bottoms* or the other cases that relied on the sodomy laws demonstrating that the litigants had engaged in the illegal behavior prohibited by the relevant sodomy statute. In addition, the specific behaviors forbidden by sodomy laws varied widely, and the laws were very rarely enforced, thus suggesting that the moral and religious motivations that initially supported enactment of sodomy laws no longer had community support. See generally Cain, *supra* note 2, at 1587–1608 (describing far-reaching negative effects of sodomy statutes on lesbian and gay litigants).

195. See generally NUSSBAUM, *supra* note 8 (discussing the idea that much legal discrimination against gays and lesbians is motivated by disgust).

relations cases, especially those involving child custody and visitation issues.<sup>196</sup> One scholar who studied this phenomenon concluded that even parents imprisoned for committing serious crimes were “treated to less spurious moralizing and discrimination” than were homosexual parents.<sup>197</sup> As the new millennium dawned, Professor Rivera revisited

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196. See, e.g., Susan J. Becker, *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENV. U. L. REV. 75 (1996).

197. Anne T. Payne, *The Law and the Problem Parent: Custody and Parental Rights of Homosexual, Mentally Retarded, Mentally Ill and Incarcerated Parents*, 16 J. FAM. L. 797, 818 (1977); see also, e.g., *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (quoting *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998)) (affirming custody change from mother to father due to mother’s lesbian relationship because mother had “chosen to expose the child continuously to a lifestyle that is ‘neither legal in this state, nor moral in the eyes of most of its citizens’”); *Evans v. Evans*, 185 Cal. App. 2d 566, 568 n.1, 572 (1960) (conditioning a former husband’s supervised visits with children on his moving out of the home he shared with his male partner, moving into his parent’s home, and obtaining ongoing psychiatric help and holding that his wife was not in contempt of custody order for moving children to another state with her new husband because she was “endeavoring to establish a normal home” for the children); *S. v. S.*, 608 S.W.2d 64, 67 (Ky. Ct. App. 1980) (relying on speculation of potential harm offered by a court-appointed psychologist, despite no showing of harm when the case was decided, to reverse a mother’s custody award due to the possibility that her lesbianism may harm the child in the future); *H. v. H.*, 157 A.2d 721, 726 (N.J. Super Ct. 1959) (finding that a wife’s homosexuality constituted extreme cruelty justifying divorce because “[a]dded to the insult of sexual disloyalty per se . . . is the natural revulsion arising from the knowledge . . . that the spouse’s betrayal takes the form of perversion”); *In re Jane B.*, 380 N.Y.S.2d 848, 860–61 (N.Y. App. Div. 1976) (concluding that “the homosexual relationship admittedly carried on by the respondent mother and [mother’s lesbian partner] in the apartment where the infant child . . . resides, creates an improper environment for this child,” justifying custody change to father and limiting mother’s visitation with child to situations where no other homosexuals are present); *In re Charles Mara*, 150 N.Y.S.2d 524, 525–26 (N.Y. Dom. Rel. Ct. 1956) (allowing wife who took in homosexual boarder to retain custody of children but placing children under court supervision to make sure children “are not subjected to any unwholesome or immoral influence” and further requiring psychiatric examination of children to determine whether such influence has already occurred); *Jacobson v. Jacobson*, 314 N.W.2d 78, 80 (N.D. 1981) (confirming that homosexuality is “a significant factor to be considered in determining the custody of children”); *Roberts v. Roberts*, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985) (finding that the trial court abused its discretion by not imposing severe restrictions on a homosexual father’s visits with his three children and remanding the case with the suggestion that the only alternative may be “to terminate visitation until the children attain such an age that they will not be harmed or influenced by learning of their father’s homosexuality”);

the rights and opportunities afforded LGBT citizens in this county. After noting significant gains, Professor Rivera pondered whether “the glass may be half empty rather than half full.”<sup>198</sup>

In short, volumes of cases attest to the judiciary’s willingness to embrace and affirm stereotypical characterizations of homosexuals as sexually perverted and psychologically unstable.<sup>199</sup> These attitudinally driven decisions continued despite case-specific evidence explicitly

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M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982) (concluding that the trial court did not err by stripping lesbian mother of custody because her son might be harmed during his adolescent years when he has to reconcile conflicting views of homosexuality and morality espoused by his mother and by society); Constant A. v. Paul C.A., 496 A.2d 1, 10 (Pa. Super. Ct. 1985) (concluding that “[t]here are sufficient social, moral and legal distinctions between the traditional heterosexual family relationship and illicit homosexual relationship to raise the presumption of regularity in favor of the licit, when established, shifting to the illicit, the burden of disproving detriment to the children”); Commonwealth *ex rel.* Bachman v. Bradley, 91 A.2d 379, 381 (Pa. Super. Ct. 1952) (awarding a wife exclusive custody of a couple’s two children and allowing her to decide whether bisexual former husband would be allowed visitation, even though record showed that children were not exposed to husband’s sexuality or harmed by it and reasoning that “the absence of harmful influences in the past does not eliminate the probabilities of the future”); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (holding that a homosexual “father’s continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian,” and further stating that the father’s “unfitness is manifested by his willingness to impose” on his children the social condemnation associated with homosexuality “in exchange for his own gratification”). In addition to domestic relations disputes, courts lessened the burden of proof for establishing harm due to homosexuality in other types of cases, including employment and immigration. *See, e.g.,* Schlegel v. United States, 416 F.2d 1372, 1378 (Ct. Cl. 1969) (affirming legitimacy of plaintiff’s employment termination on rationale that a homosexual’s presence would undermine morale and efficiency of workplace because fellow employees know “that a homosexual act is immoral, indecent, lewd, and obscene”); Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1345–46 (Wash. 1977) (affirming termination of a teacher despite twelve years of excellent evaluations because “[h]omosexuality is widely condemned as immoral and was so condemned as immoral during biblical times,” because teacher indicated no intent to change, and because he “made a voluntary choice for which he must be held morally responsible”).

198. Rivera II, *supra* note 1, at 1187.

199. *See* cases cited *supra* note 197; *see also* People v. Friede, 233 N.Y.S. 565, 567 (Magis. Ct. 1929) (condemning the tragic tales of the same-sex couples described in *The Well of Loneliness*, RADCLYFFE HALL, *THE WELL OF LONELINESS* (1928), as obscene due to the “unnatural and depraved relationships portrayed” and the book’s alleged subtext of justifying “the right of a pervert to prey upon normal members of a community”).

contradicting the stereotypes of gay men and lesbians that judges willingly embraced.<sup>200</sup> This judicial mindset is especially well documented in cases where same-sex couples sought recognition of and legal protection for their relationships. A trilogy of California cases illustrates judges' traditional reluctance to acknowledge that homosexual relationships are based on anything other than sexual conduct.<sup>201</sup>

In its groundbreaking decision in *Marvin v. Marvin*,<sup>202</sup> the Supreme Court of California identified legal and equitable principles providing for the distribution of property acquired in nonmarital relationships.<sup>203</sup> The court rejected the rationales used by the trial court and courts in other jurisdictions to deny recognition of nonmarital relationships including public policy favoring marriage, traditional moral norms, and analogies to prostitution.

The heterosexual couple in *Marvin* had cohabitated for seven years. Marriage was impossible because one of the principals, actor Lee Marvin, remained married to another woman during part of the cohabitation. When Lee's nonmarital relationship with Michelle failed, Michelle sued for half the value of Lee's property and enforcement of his alleged promise of continued financial support in exchange for her promise to sacrifice her career and "devote her full time to defendant . . . as a companion, homemaker, housekeeper and cook."<sup>204</sup>

California's Supreme Court held "that a contract between nonmarital partners will be enforced unless expressly and inseparably based upon an illicit consideration of sexual services."<sup>205</sup> Even without a contract, the court declared that a nonmarital partner may be entitled to remuneration under implied contract, partnership or joint venture, and constructive or resulting trusts.<sup>206</sup> "Finally," the court concluded, "a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable

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200. The stereotype affirmation cases also reflect the courts' uneasy relationship with science in general and the social sciences—including psychology in particular. See *generally* Becker, *supra* note 8, at 231–49 (discussing the tension and interaction between science and the law, specifically with regard to discrimination against gay men and lesbians).

201. This judicial reluctance has also been obvious in the courts of other states. See *In re Sharon Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991) (documenting the eight-year legal battle of Karen Thomson to become the legal guardian of her partner after her partner suffered irreversible brain damage in an automobile accident).

202. 557 P.2d 106 (Cal. 1976).

203. *Id.* at 110.

204. *Id.*

205. *Id.* at 114.

206. *Id.* at 122.



value of support received if he can show that he rendered services with the expectation of monetary reward.”<sup>207</sup>

The broad equitable and legal relief *Marvin* announced was not expressly limited to heterosexual partners, but courts resisted its application to homosexual partners. In *Jones v. Daly*,<sup>208</sup> for example, the plaintiff asserted facts striking similar to those asserted by Michelle Marvin. Plaintiff claimed that he gave up his career to “render his services as a lover, companion, homemaker, traveling companion, housekeeper and cook”<sup>209</sup> in exchange for his partner’s express promise to “furnish financial support to plaintiff for the rest of his life.”<sup>210</sup> Because Jones’s complaint referred to his role as Daly’s lover, the California appeals court held that his “allegations clearly show that plaintiff’s rendition of sexual services to Daly was an inseparable part of the consideration for the ‘cohabitators agreement,’ and indeed was the predominant consideration.”<sup>211</sup> Applying *Marvin*’s rule that compensation cannot be received for sexual services, the court held that Jones could not prevail on any legal or equitable theory.<sup>212</sup>

The *Jones* Court’s citation of the *Marvin* rule denying reimbursement for a partner’s sexual services is accurate. The court’s distinction between the sexual services provided by the respective plaintiffs in *Marvin* and *Jones* is not.

Michelle Marvin’s sexual services to her heterosexual partner no doubt played an integral role in their heterosexual cohabitation agreement. She described the agreement as requiring the couple to act as “husband and wife,” a relationship commonly assumed to involve sex.<sup>213</sup> Indeed, the *Marvin* court’s lengthy refutation of defendant’s argument that awarding the relief his partner requested was equivalent to rewarding prostitution acknowledges that sex was an integral component of the Marvin cohabitation agreement.<sup>214</sup> Despite sex being a core component of the cohabitation agreement, the *Marvin* court found the sexual services aspect of the agreement severable and not an impediment to the relief the heterosexual cohabitating plaintiff sought.

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207. *Id.* at 122–23.

208. 122 Cal. App. 3d 500 (1981).

209. *Id.* at 505.

210. *Id.* Plaintiff’s claims in *Jones* were asserted against his partner’s estate, but that does not change the nature of the claims per se.

211. *Id.* at 508 (emphasis added).

212. *Id.* at 511.

213. *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

214. *Id.* at 112–16.

In contrast, the *Jones* Court's conclusion that the homosexual cohabitating plaintiff's sexual services were "the predominant consideration" for the Jones-Daly cohabitation agreement is not supported by any evidence other than allegations in Jones's complaint that Jones was serving as a "lover, companion, homemaker, traveling companion, housekeeper and cook."<sup>215</sup> The court provided no explanation as to why the inclusion of "lover" outweighed all five other categories of services for which plaintiff sought compensation. The court also construed the word "cohabiting" in Jones's complaint as "only" pertaining to sexual services, again without adequate explanation.<sup>216</sup> The *Jones* Court further failed to explain why it ignored the *Marvin* mandate that "any severable portion of the contract supported by independent consideration will still be enforced."<sup>217</sup> As in *Marvin*, the *Jones* Court could have severed the sacrifice by plaintiff of his career and his services as companion, homemaker, traveling companion, housekeeper, and cook from sexual services and thus provided the relief sought.<sup>218</sup>

Finally, after relying exclusively on Jones's complaint to determine the relationship was all about sex, the *Jones* Court upheld the trial court's denial of plaintiff's request to reframe his claims in an amended complaint.<sup>219</sup> In an analysis that would fail any first-year civil procedure exam, the court held that it "would simply constitute an idle act" to allow plaintiff to amend because the complaint filed "shows on its face that the 'cohabitators agreement' is unenforceable."<sup>220</sup> In contrast, the *Marvin* Court recognized the major flaws in Marvin's complaint as the reason to allow her to amend her complaint and obtain a remedy for the non-sexual services she provided.<sup>221</sup>

In short, the *Jones* Court's selective reliance on the *Marvin* decision and its denial of plaintiff's request to amend the complaint expose that opinion as a classic example of the attitudinal or realism schools of judicial decision making.

Seven years later, another California court of appeal rejected the *Jones* Court's view that homosexual partners who entered a cohabitation agreement were bargaining primarily for sexual services. Like the plaintiffs in *Marvin* and *Jones*, the plaintiff in *Whorton v.*

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215. *Jones*, 122 Cal. App. 3d at 508–09.

216. *Id.* at 508.

217. *Marvin*, 557 P.2d at 114 (emphasis added).

218. Notably, some courts have indicated that severance would have been proper. See *Bergen v. Wood*, 14 Cal. App. 4th 854, 859 (1993) (concluding that *Jones* was "wrongly decided").

219. *Jones*, 122 Cal. App. 3d at 510–11.

220. *Id.* at 511.

221. *Marvin*, 557 P.2d at 123.

*Dillingham*<sup>222</sup> claimed to have foregone educational and career opportunities and provided numerous services for his now-former partner in exchange for significant equity in his partner's real estate holdings and a promise of financial support for life.<sup>223</sup> Unlike the plaintiffs in *Marvin* and *Jones*, Whorton characterized the services he provided as businesslike rather than personal.

More specifically, Whorton claimed that his "exclusive, full-time occupation was to be Dillingham's chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments, and to appear on his behalf when requested."<sup>224</sup> Whorton also alleged he was obligated to "render labor, skills, and personal services for the benefit of Dillingham's business and investment endeavors."<sup>225</sup> In addition, plaintiff claimed that he "was to be Dillingham's constant companion, confidant, traveling and social companion, and lover."<sup>226</sup> Finally, Whorton alleged that he and his partner had agreed "that any portion of the agreement found to be legally unenforceable was severable and the balance of the provisions would remain in full force and effect."<sup>227</sup>

Despite the artfully pleaded complaint, the trial court invoked the *Jones* rationale, dismissing the case because the sexual services Whorton provided were inseparable from his other contractual duties, thus rendering the entire contract unenforceable. In *Whorton*, the appellate court reversed:

The services which plaintiff alleges he agreed to and did provide included being a chauffeur, bodyguard, secretary, and partner and counselor in real estate investments. If provided, these services are of monetary value, and the type for which one would expect to be compensated unless there is evidence of a contrary intent. Thus, they are properly characterized as consideration independent of the sexual aspect of the relationship. By way of comparison, such services as being a constant companion and confidant are not the type which are usually monetarily compensated nor considered to have a "value" for purposes of contract consideration, and, absent peculiar circumstances, would likely be considered so intertwined with the sexual relationship as to be inseparable.<sup>228</sup>

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222. 202 Cal. App. 3d 447 (1988).

223. *Id.* at 450.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 454.

This passage from *Whorton* appears to be a model of judicial independence because it applies the rules of *Marvin* to the complaint without regard for the sexual orientation of the parties. It also accurately recites the general contract rule that social niceties like companionship and maintaining confidence constitute insufficient consideration for a contract. But upon further inspection, fine cracks appear in the veneer of judicial independence. For example, *Marvin* recognized a number of equitable remedies in the cohabitating partner scenario. *Whorton* makes no mention of those. In addition, while providing companionship and serving as a confidant require that one person devote time and attention to one's partner, it does not necessarily follow that such services are automatically intertwined with sex.

Overall the *Whorton* decision moves much closer to the goal of judicial independence than the *Jones* case. But the *Whorton* court's conflation of companionship and sex reflects the continuing and significant influence of judicial attitudes that homosexual relationships are almost exclusively about sex. This is a common theme throughout the history of LGBT rights cases.<sup>229</sup>

### III. JUDICIAL INDEPENDENCE SHIFT IN LGBT MARRIAGE CASES

The Supreme Court's 2013 *United States v. Windsor*<sup>230</sup> decision makes marriage cases an appropriate and timely lens through which to examine the ongoing shift in judicial decision-making models in cases involving LGBT litigants.

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229. See, e.g., J.P. v. P.W., 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (quoting Roberts v. Roberts, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985)) (declaring in custody case that "the state has a substantial interest in viewing homosexuality as errant sexual behavior which threatens the social fabric"); *In re Jane B.*, 380 N.Y.S.2d 848, 857 (N.Y. App. Div. 1976) (declaring that "innocent bystanders or children . . . may be affected physically and emotionally by close contact with homosexual conduct of adults," even though no evidence of sexual conduct was presented in that case); *Gaylord v. Tacoma Sch. Dist.* No. 10, 559 P.2d 1340, 1343–44 (Wash. 1977) (upholding a teacher's dismissal for "immorality" because teacher "admitted his status as a homosexual," from which the court concluded that "it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt act having been committed"). See generally NUSSBAUM, *supra* note 8 (discussing the idea that much legal discrimination against gays and lesbians is motivated by disgust); Christopher Carnahan, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with the Best Interests of Children*, 11 CARDOZO WOMEN'S L.J. 1 (2004) (discussing the need to both protect the interests of children and avoid negatively treating homosexuals in the law).

230. 133 S. Ct. 2675 (2013).

A. *The Long Shadow of Baker v. Nelson*

*Baker v. Nelson*<sup>231</sup> is commonly acknowledged as the first reported case challenging the heterosexual exclusivity of marriage. Richard John Baker and James Michael McConnell argued that Minnesota's rejection of their marriage license application violated state and federal constitutional provisions, including the due process and equal protection guarantees of the Fourteenth Amendment.<sup>232</sup> The Minnesota Supreme Court summarized plaintiffs' arguments as an "assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."<sup>233</sup>

Minnesota's highest court readily acknowledged the U.S. Supreme Court's characterization of marriage as a "basic civil right" that is "fundamental to our very existence and survival,"<sup>234</sup> and that constitutional guarantees of privacy surround the marriage relationship.<sup>235</sup> But the court found no reason to extend these bedrock constitutional principles to a couple of the same sex.

To the contrary, the *Baker* Court concluded that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."<sup>236</sup> The court found neither contemporary concepts of marriage nor societal interests as justification for modifying its Bible-based paradigm of marriage, concluding that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation."<sup>237</sup>

The *Baker* Court was unwavering in its reliance on procreation and child rearing as its primary rationale for reserving marriage exclusively for opposite sex couples, even though, as plaintiffs pointed out, some married couples never procreate or raise children. "[T]he classification is no more than theoretically imperfect," the court reasoned, further explaining that the Fourteenth Amendment does not demand "abstract symmetry."<sup>238</sup>

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231. 191 N.W.2d 185 (Minn. 1971).

232. *Id.* at 186.

233. *Id.*

234. *Id.* at 187 (citations omitted) (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

235. *Id.* at 186 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

236. *Id.* at 186.

237. *Id.*

238. *Id.* at 187.

Minnesota's Supreme Court expressed an equally firm conviction that *Loving v. Virginia*,<sup>239</sup> the U.S. Supreme Court decision that declared antimiscegenation statutes contrary to Fourteenth Amendment equal protection guarantees, had no relevance to same-sex marriage.<sup>240</sup> The *Baker* court characterized racial discrimination as "directly subversive of the principle of equality at the heart of the Fourteenth Amendment,"<sup>241</sup> and concluded that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."<sup>242</sup>

The same-sex partners in *Baker* sought U.S. Supreme Court review on the grounds that Minnesota's denial of their marriage license violated their Fourteenth Amendment substantive due process fundamental right to marry, constituted gender discrimination in violation of the Fourteenth Amendment equal protection clause, and denied their privacy rights grounded in the Ninth Amendment.<sup>243</sup> The U.S. Supreme Court rejected the appeal in a one-sentence order, stating that the appeal was "dismissed for want of a substantial federal question."<sup>244</sup>

McConnell, one of the *Baker* plaintiffs, was subsequently denied employment with the University of Minnesota for seeking a marriage license. The federal district court analogized McConnell's treatment by the university to the witch hunts of homosexuals exercised during the McCarthy era and concluded that such discriminatory treatment

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239. 388 U.S. 1 (1967).

240. *Baker*, 191 N.W.2d at 187.

241. *Id.* (quoting *Loving v. Virginia*, 388 U.S. 1, 12).

242. *Id.* at 187.

243. Jurisdictional Statement of Appellants at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

244. *Baker*, 409 U.S. at 810. Because this case was before the Court pursuant to a mandatory appeal, the precedential value of its dismissal has engendered significant debate. See Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1274 (1980) (discussing whether *Baker*'s dismissal established that no federal constitutional rights are implicated in a state's denial of same-sex marriage). Compare *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) (finding that *Baker* does preclude federal constitutional challenges to state laws banning same-sex marriage), with *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (concluding *Baker* is no longer controlling in challenges to state same-sex marriage bans due to subsequent Supreme Court opinions on equal protection grounds). The Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), does not fully resolve the continuing relevance of *Baker* because it was based on a Fifth Amendment equal protection challenge to a federal law prohibiting same-sex marriage.

violated McConnell's liberty and property interests under the Fourteenth Amendment.<sup>245</sup> In *McConnell v. Anderson*,<sup>246</sup> the Eighth Circuit reversed, holding that a state university's decision not to hire McConnell due to his homosexuality did not constitute the "arbitrary, unreasonable or capricious" level of conduct required for courts to intervene.<sup>247</sup> The court held:

[I]t is at once apparent that this is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct. It is, instead, a case in which something more than remunerative employment is sought; a case in which the applicant seeks employment on his own terms; a case in which the prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the right to pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer, who is, in this instance, an institution of higher learning. We know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands.<sup>248</sup>

In short, *Baker* and *McConnell* characterized a same-sex couple's request to marry as a "socially repugnant" and "extravagant demand."<sup>249</sup> Other judges embraced this perspective.<sup>250</sup> What cannot be measured, of course, is the profound effect the *Baker* and *McDonnell* decisions had in discouraging lesbian and gay activists from pursuing marriage equality litigation for decades after those cases were decided.

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245. *McConnell v. Anderson*, 316 F. Supp. 809, 814–15 (D. Minn. 1970).

246. 451 F.2d 193 (8th Cir. 1971).

247. *Id.* at 196.

248. *Id.* at 196. The Eighth Circuit also summarily rejected McConnell's argument that the University's decision violated his First Amendment right to speak on issues of political and social concern. *Id.* at 196 n.7.

249. *Id.* at 196.

250. *See, e.g.*, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). As in the *Nelson* case, one of the *Singer* plaintiffs was subject to employment discrimination for seeking a marriage license with his same-sex partner. *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 248 (9th Cir. 1976), *vacated on other grounds*, 429 U.S. 1034 (1977).

More recently, the Supreme Court's recognition of the federal constitutional rights of gay men and lesbians in cases such as *Romer v. Evans*<sup>251</sup> and *Lawrence v. Texas*<sup>252</sup> led federal courts to question *Baker's* apparent bar to federal constitutional marriage equality claims.<sup>253</sup> But *Baker's* continued impact, if any, will not be fully resolved until the Supreme Court resolves a Fourteenth Amendment equal protection challenge to a state's denial of a same-sex couple's right to marry.<sup>254</sup>

*B. Pro-Equality State Decisions Prior to Windsor and Perry*

1. Hawaii's Saga: *Baehr v. Lewin*

The Hawaii case of *Baehr v. Lewin*<sup>255</sup> represents the first significant victory for marriage equality advocates, albeit a short-lived one. *Baehr* offers a classic example of judicial independence due to the trial court's: 1) full consideration of the extensive evidence plaintiffs adduced to dismantle negative stereotypes about same-sex couples and their parenting abilities; and 2) appropriate application of established legal doctrine to that largely uncontroverted evidence.

Three same-sex couples denied marriage licenses alleged in *Baehr* that the state's rejection of their marriage applications violated Hawaii's constitutional guarantees of privacy, equal protection, and due process. On October 1, 1991, the *Baehr* trial court dismissed the

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251. 517 U.S. 620 (1996) (concluding that a state constitutional amendment denying gay and lesbian citizens opportunity to seek anti-discrimination protection via local and state law violated Fourteenth Amendment equal protection guarantees under rational basis analysis).
252. 539 U.S. 558 (2003) (declaring state sodomy laws unconstitutional due to violation of federal constitutional privacy rights of gay men and lesbians).
253. See, e.g., *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) (concluding that "*Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage"), *cert. denied*, 133 S. Ct. 2884 (2013); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 307–09, 333 n.9 (D. Conn. 2012) (distinguishing the federal constitutional issues in *Baker* as related to challenges to state law banning marriage compared to federal law at issue in DOMA and stating that "[a]rguably, the Supreme Court's subsequent decisions in *Romer* and *Lawrence* reflect doctrinal developments that suggest the Supreme Court would no longer consider the federal question in *Baker* to be unsubstantial and therefore binding on lower courts").
254. *Massachusetts*, 682 F.3d at 8. *United States v. Windsor*, 133 S. Ct. 2675 (2013), may telegraph the Court's view that denial of marriage equality violates Fourteenth Amendment equal protection guarantees, but *Windsor* was resolved on Fifth Amendment equal protection grounds. Accordingly it does not fully repudiate *Baker*.
255. 852 P.2d 44 (Haw. 1993).



couples' complaint for failure to state a claim prior to any evidence being submitted in the case.<sup>256</sup> Hawaii's Supreme Court reversed, declaring the trial court's dismissal inappropriate because the trial court had made factual findings and rendered conclusions of law instead of limiting its analysis to the face of the complaint.<sup>257</sup> Rather than merely remanding to the trial court, the court provided a detailed analysis of same-sex marriage under the Hawaii Constitution.

In its plurality decision, Hawaii's highest court found no fundamental right to marriage "arising out of the right to privacy or otherwise."<sup>258</sup> Two of the four justices, however, held that denial of marriage licenses to persons of the same sex implicated Hawaii's explicit constitutional guarantee of equal protection based on sex, thus requiring strict scrutiny of the state's reasons for that denial.<sup>259</sup> These two justices deemed the denial presumptively unconstitutional, requiring the state to prove "compelling state interests" for excluding same-sex couples from marrying and to demonstrate that "the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights."<sup>260</sup> The concurring judge also foresaw a possible equal protection claim based on sex, but only if plaintiffs could show that "heterosexuality, homosexuality, bisexuality, and asexuality are 'biologically fated.'"<sup>261</sup>

At trial after remand,<sup>262</sup> the state attempted to satisfy strict scrutiny by asserting compelling state interests in: (1) promoting "the optimal development of children," further urging that "all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female"; (2) "securing or assuring recognition of Hawaii marriages in other jurisdictions"; and (3) "protecting the public fisc from the reasonably foreseeable effects of approval of same-sex marriage."<sup>263</sup> Because the state provided minimal (and ultimately unpersuasive) evidence on the latter two points,<sup>264</sup> the optimal environment for child-rearing became the determinative issue.

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256. *Id.* at 53.

257. *Id.* at 54.

258. *Id.* at 57.

259. *Id.* at 67.

260. *Id.*

261. *Id.* at 69–70 (Burns, J., concurring).

262. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

263. *Id.* at \*3.

264. The dearth of evidence presented by the state on the financial ramifications of marriage equality and possible conflict of laws issues is

Defendants proffered the testimony of four expert witnesses to support the state's claimed interests in limiting marriage to opposite-sex couples. One defense expert claiming psychology credentials was disqualified from testifying about alleged methodological flaws in social science studies on same-sex families due to his belief that all "modern psychology is so flawed that no fix, reconciliation or overhaul can correct it."<sup>265</sup> The other three defense experts provided significant support for *plaintiffs'* arguments that no compelling rationale exists for treating same-sex couples differently than their heterosexual counterparts.

Defense experts tried to stress the importance of having both a mother and a father to a child's development, but they readily conceded that gay and lesbian parents can and do make excellent parents. Based on research and his own clinical experience, for example, child psychiatrist Dr. Kyle Pruett conceded that "the beneficial results described above are not essential to being a happy, healthy and well-adjusted child";<sup>266</sup> "in general, gay and lesbian parents are as fit and loving parents as non-gay persons and couples";<sup>267</sup> "same-sex couples should be allowed to adopt children, provide foster care and to take children in and raise and care for them";<sup>268</sup> and "the quality of the nurturing relationship between parent and child could, and would, outweigh any limitation or burden imposed on the child as a result of having same-sex parents."<sup>269</sup> Defense experts also agreed that children of same-sex couples would greatly benefit from the legal and social benefits associated with their parents' marriages.<sup>270</sup>

Based on their extensive clinical experience and academic studies of families headed by same-sex couples, plaintiffs' four experts confirmed that same-sex couples provide excellent environments for

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addressed in the trial court's "Specific Findings" (¶¶ 117, 118) and "Conclusions of Law" (¶¶ 12, 13). *Id.* at \*16, 19–20.

265. *Id.* at \*8 (excluding testimony of Dr. Richard Williams).

266. *Id.* at \*4. Defense expert and sociologist Dr. David Eggebeen also conceded that "same-sex couples can create stable family environments and raise healthy and well-adjusted children." *Id.* at \*7.

267. *Id.* at \*5. Defense expert and psychologist Dr. Thomas Merrill similarly stated that "that the sexual orientation of a parent is not an indication of parental fitness" and that "gay and lesbian couples with children do have successful relationships." *Id.* at \*10.

268. *Id.* at \*5. Defense expert Dr. David Eggebeen similarly acknowledged that gay and lesbian parents "should be allowed to adopt children and serve as foster parents." *Id.* at \*8.

269. *Id.* at \*5.

270. *Id.* at \*8 (relating the testimony of defense expert Dr. David Eggebeen); *id.* at \*10 (relating the testimony of defense expert Dr. Thomas Merrill).

their children.<sup>271</sup> One of plaintiffs' experts, pediatrician Dr. Robert Bidwell, admitted that children of nontraditional families may experience some discomfort from being different, but explained that such discomfort will not necessarily harm the child. All children wish on occasion for their parents to be different, Dr. Bidwell explained, but that "doesn't do developmental damage to these kids."<sup>272</sup> "If anything, it creates strength and promotes growth."<sup>273</sup>

Based on the virtually undisputed evidence that same-sex couples are effective parents and that both parents and children would benefit greatly from state recognition and support of their families, the court found no compelling state reason justifying the state's denial of marriage to them.<sup>274</sup> Following extensive findings of fact, the *Baehr* trial court summarized its evidentiary conclusion. "Simply put," the court explained, "Defendant has failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage."<sup>275</sup>

In this classic exercise of judicial independence, the *Baehr* trial court then applied established Hawaiian constitutional law principles to its well-documented findings of fact. Although marriage was not recognized as a fundamental right in Hawaii,<sup>276</sup> plaintiffs had a viable constitutional challenge grounded in the state's constitutional

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271. *Id.* at \*10–16. Plaintiffs experts were: (1) sociologist Dr. Pepper Schwartz, described by the court as "an expert in sociology and interdisciplinary studies of sexuality with a special expertise in gender and human sexuality, marriage and the family, and same-sex relations in parenting and research"; (2) Dr. Charlotte Patterson, a University of Virginia professor specializing in the "psychology of child development with a special expertise in lesbian and gay parenting and the development of children of lesbian and gay parents"; (3) Dr. David Brodzinsky, a clinical psychologist with an academic appointment at Rutgers University with expertise in "adoption and other forms of nonbiological parenting and the development of children raised by nonbiological parents"; and (4) Dr. Robert Bidwell, a pediatrician with a subspecialty in adolescent medicine who "teaches medical students and pediatric residents in training, provides patient care, and practices adolescent medicine and general pediatrics at Kapiolani Medical Center." *Id.* at \*11–15.

272. *Id.* at \*16.

273. *Id.*

274. The court also found that the state had failed to provide sufficient evidence of damage to the state's fisc or adverse harm to Hawaii if other states failed to recognize Hawaii's same-sex marriage couples. *Id.* at \*16.

275. *Id.* at \*18.

276. *Id.* at \*19. Hawaiian marriage is a "legal status which gives rise to certain rights and benefits" rather than a fundamental right. *Id.*

guarantee against sex-based discrimination.<sup>277</sup> The evidentiary record unequivocally demonstrated that the state had not met its burden under strict scrutiny to demonstrate “compelling state interests” for the denial or to show that the statutory exclusion had been “narrowly drawn to avoid unnecessary abridgments of constitutional rights.”<sup>278</sup> The trial court concluded:

Defendant has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage. Nor has Defendant demonstrated how same-sex marriage would adversely affect the public fisc, the state interest in assuring recognition of Hawaii marriages in other states, the institution of traditional marriage, or any other important public or governmental interest.<sup>279</sup>

The *Baehr* litigation stands both as a model of judicial independence and as a testament to the need for an independent judiciary to counter the majoritarian trampling of minority rights. This landmark case created a firestorm of backlash, fueling the passage of the federal Defense of Marriage Act in 1996 and this amendment to the Hawaiian Constitution: “The legislature shall have the power to reserve marriage to opposite-sex couples.”<sup>280</sup> As the Supreme Court of Hawaii explained, the amendment validated the statute struck down by the trial court “by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples.”<sup>281</sup>

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277. *Id.* at \*19.

278. *Id.* at \*19.

279. *Id.* at \*21. The court also rejected the argument that allowing same-sex couples to marry will lead inevitably to legalization of incest, polygamy, and prostitution because that argument “disregards existing statutes and established precedent” and overlooks the language in the Hawaiian Supreme Court’s decision remanding this case which acknowledged “compelling reasons to prevent and prohibit marriage under circumstances such as incest.” *Id.* at \*20 (citing *Baehr v. Lewin*, 852 P.2d 44, 59 n.19 (Haw. 1993)).

280. HAW. CONST. art I, § 23. The amendment was passed by Hawaii’s House and Senate in 1997 and ratified by voters in 1998. *Id.*

281. *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at \*6 (Haw. 1999). More than two decades after the *Baehr* litigation began, the battle for marriage equality in Hawaii appeared to end on November 13, 2013, with the governor’s signature of legislation extending marriage to same-sex couples. See Doug Mataconis, *Hawaii About to Legalize Same-Sex Marriage: What a Difference 20 Years Makes*, OUTSIDE THE BELTWAY (Nov. 9, 2013), <http://www.outsidethebeltway.com/hawaii-about-to-lega>

2. Massachusetts, California, and Iowa Equality Decisions

In the two decades following the Hawaii Supreme Court's initial *Baehr* decision, marriage equality advocates experienced significant victories and stunning setbacks. The majority of setbacks were delivered not by judges but by legislators and voters who locked marriage inequality into state constitutions and federal statutes.<sup>282</sup> Many state constitutional amendments extended beyond marriage bans to preclude any form of relationship recognition for same-sex couples, including comprehensive domestic partnerships and civil unions.<sup>283</sup>

In sharp contrast, some judges demonstrated their commitment to judicial independence by being receptive to the legal and factual arguments advanced for marriage equality. As a result of the "uncommon portion of fortitude"<sup>284</sup> exhibited by these judges,

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lize-same-sex-marriage-what-a-difference-20-years-makes/ (providing a succinct explanation of national and state consequences of Hawaii's 1993 *Baehr* decision). Because Hawaii's constitution empowers the state legislature to revoke the right of same-sex couples to marry, same-sex couples are pursuing litigation alleging that the federal constitution prohibits the state legislature from ever reversing its current marriage equality stance. The plaintiffs prevailed at the trial level. *See Jackson v. Abercrombie*, 884 F. Supp. 1065 (D. Hawaii 2012). As of September 2014, the case was pending in the Ninth Circuit Court of Appeals. Updates on *Jackson* and on all marriage equality cases pending in the United States are available at <http://www.lamdalegal.org/pending-marriage-equality-cases>.

282. As of December 2013, twenty states had constitutional amendments prohibiting same-sex marriage and other forms of relationship recognition: Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. *Where State Laws Stand, FREEDOM TO MARRY*, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last visited Feb. 1, 2014) [hereinafter *State Laws*]. The constitutional amendments in nine states only prohibit marriage by same-sex couples but do not outlaw other forms of relationship recognition: Alaska, Arizona, Colorado, Missouri, Mississippi, Montana, Nevada, Oregon, and Tennessee. Four states—Indiana, Pennsylvania, West Virginia and Wyoming—have statutes limiting marriage to opposite-sex couples but no constitutional bans. *Id.* As of September 1996, the federal Defense of Marriage Act (DOMA) barred the federal government from recognizing same-sex marriages for the purpose of federal laws, obligations, and benefits and provided that no state had to recognize marriages of same-sex couples legally performed in other states. *See* 1 U.S.C. § 7 (2012) (governing federal law), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013); 28 U.S.C. § 1738C (2012) (applicable to states).

283. *State Laws*, *supra* note 282.

284. This term is employed by Alexander Hamilton when articulating the need for independent judiciary to safeguard minority rights. THE FEDERALIST NO. 78, *supra* note 16, at 509 (Alexander Hamilton).

marriage equality became a reality in Massachusetts,<sup>285</sup> California,<sup>286</sup> Connecticut,<sup>287</sup> and Iowa.<sup>288</sup> Each case featured an evidentiary record similar to the record established in the *Baehr* litigation applied to equal protection and other rights established by state constitutions. The Supreme Court of Iowa's unanimous decision in *Varnum v. O'Brien*<sup>289</sup> is illustrative of these courts' application of the rule of law to the credible evidence of record.

Evidence proffered in *Varnum* including the following:

- The twelve plaintiffs are, “[l]ike most Iowans, . . . responsible, caring, and productive individuals” who “are contributing, benevolent members of their communities.”<sup>290</sup>
- “Like many Iowans, some have children and others hope to have children.”<sup>291</sup>
- “Despite the commonality shared with other Iowans, the twelve plaintiffs are different from most in one way. They are sexually and romantically attracted to members of their own sex.”<sup>292</sup>
- Plaintiffs’ exclusion from the rights, benefits, and responsibilities associated with marriage places them at a distinct disadvantage compared to their heterosexual counterparts including “the ultimate disadvantage” of “the inability to obtain for themselves and for their children the personal and public affirmation that accompanies marriage.”<sup>293</sup>

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285. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948–49 (Mass. 2003).

286. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

287. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

288. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

289. *Id.*

290. *Id.* at 872.

291. *Id.*

292. *Id.* The court also rejected the state’s argument that same-sex couples are not “similarly situated” to heterosexual couples because evidence unequivocally established that “for purposes of Iowa’s marriage laws, which are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways, plaintiffs are similarly situated in every important respect, but for their sexual orientation.” *Id.* at 883–84.

293. *Id.* at 873.

•Plaintiffs’ argument that “same-sex couples can raise children as well as opposite-sex couples” is confirmed by “the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America.”<sup>294</sup>

The well-established state constitutional and other legal principles identified in *Varnum* included the following:

•Like the U.S. Constitution, the Iowa Constitution has a blueprint for government that establishes “three separate, but equal, branches of government and delineates the limited roles and powers of each branch.”<sup>295</sup>

•The Iowa Supreme Court “has the responsibility to determine if the law enacted by the legislative branch and enforced by the executive branch violates the Iowa Constitution.”<sup>296</sup>

•“A statute inconsistent with the Iowa Constitution must be declared void, even though it may be supported by strong and deep seated traditional beliefs and popular opinion.”<sup>297</sup>

•“The framers of the Iowa Constitution knew, as did the drafters of the United States Constitution, that ‘times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.’”<sup>298</sup>

•“The primary constitutional principle at the heart of this case is the doctrine of equal protection,” a concept that history reveals as “often expressed far more easily than it is practiced.”<sup>299</sup>

•“Like the Federal Equal Protection Clause found in the Fourteenth Amendment to the United States Constitution, Iowa’s constitutional promise of equal protection ‘is

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294. *Id.* at 873–74.

295. *Id.* at 875.

296. *Id.*

297. *Id.*

298. *Id.* at 876 (quoting *Lawrence v. Texas*, 539 U.S. 558, 579 (2003)).

299. *Id.* at 876–77.

essentially a direction that all persons similarly situated should be treated alike.”<sup>300</sup>

- In deference to the legislature, a presumption exists that the marriage statute is constitutional and plaintiffs bear “the heavy burden” of negating “every reasonable basis upon which the classification may be sustained.”<sup>301</sup>

- Based on the general guidance provided by the U.S. Supreme Court for identifying the appropriate level of equal protection scrutiny, the more specific analyses provided in state court decisions resolving marriage equality claims, and Iowa precedent, Iowa’s exclusions of same-sex couples from marriage may be subject to strict scrutiny analysis.<sup>302</sup> However, application of that standard is not necessary because the exclusion cannot even satisfy intermediate scrutiny.<sup>303</sup>

- “To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.”<sup>304</sup>

Applying these legal principles to the evidentiary record before it, the *Varnum* Court unanimously concluded that preservation of tradition is not an adequate state interest to deny marriage to same-sex couples. “If a simple showing that discrimination is traditional satisfies equal protection,” the court reasoned, “previous successful equal protection challenges of invidious racial and gender classifications would have failed.”<sup>305</sup>

While acknowledging that promoting children’s best interests is an important governmental objective, the court also found “an abundance of evidence and research” supporting “the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents.”<sup>306</sup> Similarly, while the state has a valid interest

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300. *Id.* at 878 (citation omitted) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).

301. *Id.* at 879 (citation omitted).

302. *Id.* at 885–97.

303. *Id.* at 896.

304. *Id.* (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

305. *Id.* at 898.

306. *Id.* at 899. The Court further observed that banning only same-sex marriages is under-inclusive in promoting optimal child rearing because the statute does not ban marriages of those who have a record of bad parenting and over-inclusive because it bans marriage of same-sex couples who do not intend to have children. *Id.* at 899–901. “In the end,” the *Varnum* court concluded, “a careful analysis of the over- and



in procreation to ensure “the continuation of the human race,”<sup>307</sup> “[g]ay and lesbian persons are capable of procreation,”<sup>308</sup> and heterosexual couples who “do not procreate for reasons such as age, physical disability, or choice”<sup>309</sup> are not precluded from marrying.

The *Varnum* court recognized promotion of stable opposite-sex relationships through marriage as an important government objective, but found no proof that excluding gay and lesbian couples from marriage stabilized their heterosexual counterparts.<sup>310</sup> Similarly, conservation of state resources proved insufficient grounds for the challenged marriage exclusion because exclusion of “any group from civil marriage—African-Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally ‘rational’ way.”<sup>311</sup> In addition, excluding Iowa’s approximately 5,800 couples from same-sex marriage would be both underinclusive because “conservation of state resources would be equally served by excluding any similar-sized group”<sup>312</sup> and overinclusive “because many same-sex couples, if allowed to marry, would not use more state resources than they currently consume as unmarried couples.”<sup>313</sup>

“Our equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the statute,”<sup>314</sup> the *Varnum* court concluded. “To decide otherwise would be an abdication of our constitutional duty.”<sup>315</sup>

While state constitutional law compelled Hawaii’s *Baehr* court to apply strict scrutiny and Iowa’s *Varnum* Court to employ intermediate scrutiny<sup>316</sup> to test the constitutionality of excluding

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under-inclusiveness of the statute reveals it is less about using marriage to achieve an optimal environment for children and more about merely precluding gay and lesbian people from civil marriage.” *Id.* at 901.

307. *Id.* at 901.

308. *Id.* at 902.

309. *Id.*

310. *Id.*

311. *Id.* at 903.

312. *Id.*

313. *Id.*

314. *Id.* at 904.

315. *Id.* at 906; *see also* *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412, 481 (Conn. 2008) (explaining the judiciary’s duty to ascertain the constitutionality of legislative enactments and concluding that “we do not exceed our authority by mandating equal treatment for gay persons; in fact, any other action would be an abdication of our responsibility”).

316. Connecticut’s Supreme Court also applied intermediate scrutiny to strike down that state’s exclusion of same-sex couples from marriage. *Kerrigan*, 957 A.2d at 412, 480.

same-sex couples from marriage, the Supreme Judicial Court of Massachusetts, in *Goodridge v. Department of Public Health*,<sup>317</sup> evaluated plaintiffs' equal protection claims under the rational basis test.<sup>318</sup> To survive rational basis scrutiny, the state only had to convince the court that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."<sup>319</sup> Even under that highly deferential test, *Goodridge* held that the state's purported rationales of promoting procreation, providing an optimal environment for children, and conserving state resources fell far short of justifying marriage inequality.<sup>320</sup> The *Goodridge* Court concluded:

The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.<sup>321</sup>

The foregoing explications of *Baehr*, *Varnum*, and *Goodridge* demonstrate that each court applied well-established legal principles to an extensive record of highly credible evidence to reject antiquated rationales for excluding same-sex couples from secular marriage. In so doing, the judges often addressed factors external to the law and facts that had previously influenced judicial decision making in cases involving LGBT litigants, including religion, the judge's personal sense of morality, and public opinion.

The *Varnum* court, for example, acknowledged that "[w]hether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained—even fundamental—religious belief."<sup>322</sup> The court also observed that "other equally sincere groups and people in Iowa and around the nation have strong religious views that yield the opposite conclusion."<sup>323</sup> Reiterating that the Iowa Constitution's Establishment Clause expressly prohibits the courts from resolving such religious disputes, the court explained that its determination of

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317. 798 N.E.2d 941 (Mass. 2003).

318. *Id.* at 961.

319. *Id.* at 960 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452 (1985)) (internal quotation marks omitted) (citing *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329, 333 (1989)).

320. *Id.* at 961–65.

321. *Id.* at 948.

322. *Varnum v. Brien*, 763 N.W.2d 862, 904 (Iowa 2009).

323. *Id.* at 905.

the “class of persons entitled to secular rights and benefits associated with civil marriage”<sup>324</sup> had no impact on the power of religious denominations to continue to “define marriage as a union between a man and a woman.”<sup>325</sup>

Even though the state had not asserted religious liberty as a justification for denying marriage to same-sex couples, the California Supreme Court raised and then rejected the possibility that the constitutional rights of citizens whose religious views preclude acceptance of homosexuality would be infringed by that court’s marriage equality decision. “[N]o religion will be required to change its religious policies or practices with regard to same-sex couples,” the court explained, “and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.”<sup>326</sup>

*Goodridge* similarly recognized that religion and other influences that commonly shape public opinion should not sway the court. In the second paragraph of its very lengthy opinion, the court acknowledged that many people hold deep-seated “religious, moral, and ethical convictions” regarding marriage equality, thus resulting in deep sociological and political divides on the issue.<sup>327</sup> The court rejected the possibility that public policy favoring or condemning marriage equality should shape its opinion, clarifying that its “concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach,”<sup>328</sup> further declaring that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”<sup>329</sup>

Based on application of the rule of law to the evidence presented and rejection of constitutionally irrelevant but potentially powerful external factors, these marriage equality decisions model the type of judicial independence to which judges should aspire. Rendering these decisions required significant courage, and three of the seven judges in *Varnum* were rewarded for their independence by being ousted from

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324. *Id.*; see also *Goodridge*, 798 N.E.2d at 954 (reporting that “[i]n Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution”).

325. *Varnum*, 763 N.W.2d at 906.

326. *In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008) (citing CAL. CONST. art. I, § 4). The California Constitution states that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed” and that laws “respecting an establishment of religion” are prohibited. CAL. CONST., art. I, § 4.

327. *Goodridge*, 798 N.E.2d at 948.

328. *Id.*

329. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

office in a retention election.<sup>330</sup> Still, former Iowa Supreme Court Justice Marcus Ternes would not have compromised her constitutional duty to recognize marriage equality in exchange for success at the ballot box. True independence requires a “judiciary that is committed to the rule of law, independent of—free of—outside influence, including personal bias or preference,”<sup>331</sup> Justice Ternes explained. “Only an independent judiciary can ensure that the minority is protected from the tyranny of the majority.”<sup>332</sup>

## 2. Lower Federal Court DOMA Decisions Prior to *Windsor*

The inequities codified by section 3 of the federal Defense of Marriage Act<sup>333</sup> (DOMA) became increasingly clear as more states embraced marriage equality.<sup>334</sup> Continued enforcement of DOMA’s bar to federal rights and benefits for same-sex married couples created two distinct marital classes. Opposite-sex couples continued to enjoy a privileged status accompanied by all the legal rights and benefits associated with marriage at both the state and federal levels.<sup>335</sup> Same-sex married couples were relegated to a second-tier status limited to state rights and benefits. DOMA’s codification of this unequal status was declared unconstitutional in nine federal court decisions rendered between July 2010 and October 2012.<sup>336</sup> The glaring inequality

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330. The campaign expressly targeted Chief Justice Marsha Ternes, Justice Michael Streit, and Justice David Baker based on their *Varnum* decision and was funded extensively by out-of-state funds from anti-equality groups. Curriden, *supra* note 154, at 56; A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bush*, N.Y. TIMES, Nov. 4, 2010, at A1; *see also* Pettys, *supra* note 154 (presenting a comprehensive review of the judge’s retention battle).

331. Ternes, *supra* note 10, at 480.

332. *Id.* at 487.

333. 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

334. DOMA mandates that “[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7 (2012).

335. There are 1,138 federal statutory provisions “in which marital status is a factor in determining or receiving benefits, rights, and privileges.” Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Acct. Office, to Bill First, U.S. Senate Majority Leader (Jan. 23, 2004), *available at* <http://www.gao.gov/search?q=GAO-04-353R> (further detailing the specific provisions of the code that DOMA affects).

336. The nine decisions consist of one bankruptcy court decision, six district court decisions, and two circuit court decisions. The First Circuit’s

occasioned by DOMA also resulted in the Department of Justice's decision to no longer defend the legislation against constitutional attack.<sup>337</sup> As a result, the U.S. House of Representatives' Bipartisan Legal Advisory Committee (BLAG) intervened to defend DOMA in numerous ongoing cases.<sup>338</sup>

Case	Judge	Appointing President
<i>Golinski v. U.S. Office of Personnel Management</i> <sup>339</sup>	Jeffrey White	George W. Bush
<i>Pedersen v. Office of Personnel Management</i> <sup>340</sup>	Vanessa Bryant	George W. Bush
<i>Dragovich v. U.S. Department of Treasury</i> <sup>341</sup>	Claudia Wilkin	William J. Clinton

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decision affirmed two cases brought on distinct grounds. *See infra* notes 339–351, accompanying text, and Table 2.

337. In February 2011, Attorney General Eric Holder announced that the Department of Justice would no longer defend DOMA's constitutionality because the Attorney General and President Obama had concluded that heightened scrutiny should apply to sexual orientation classifications and that DOMA's prohibition of federal recognition of same-sex couples' marriages is unconstitutional under that standard. The executive branch would, however, continue to enforce DOMA. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker of the U.S. House of Representatives, at 5 (Feb. 23, 2011) [hereinafter Holder letter], *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.
338. On March 9, 2011, the U.S. House of Representative's Bipartisan Leadership Advisory Group (BLAG) voted 3–2, along party lines, to direct the House General Counsel to defend DOMA in court. Press Release, John Boehner, Speaker of the U.S. House of Representatives, House Will Ensure DOMA Constitutionality is Determined by the Court (Mar. 9, 2011), *available at* <http://boehner.house.gov/news/documentsingle.aspx?DocumentID=228585>. After hiring former Solicitor General Paul Clement as lead counsel, BLAG successfully sought intervention in pending federal cases to defend DOMA's bar of federal recognition of same-sex couples' marriages. *See* Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why the BLAG Cannot)*, 65 STAN. L. REV. ONLINE 92, 93–94 (2013) (explaining BLAG's involvement in DOMA defense).
339. 824 F. Supp. 2d 968 (N.D. Cal. 2012) (concluding that strict scrutiny is the appropriate level of review and that DOMA is unconstitutional under that standard and under rational basis review).
340. 881 F. Supp. 2d 294 (D. Conn. 2012) (finding that legislation disadvantaging federal employees, their same-sex spouses, and their children should be subject to strict scrutiny, but applying rational basis because: (1) the U.S. Supreme Court has not recognized a higher standard; and (2) rationales offered to defend DOMA intent do not even satisfy the lowly rational basis standards).

<i>In re Balas</i> <sup>342</sup>	Eighteen Unanimous Bankruptcy Judges	(various)
<i>Gill v. Office of Personnel Management</i> <sup>343</sup>	Joseph L. Tauro	Richard M. Nixon
<i>Massachusetts v. U.S. Department of Health and Human Services</i> <sup>344</sup>	Joseph L. Tauro	Richard M. Nixon
<i>Massachusetts v. U.S. Department of Health and Human Services</i> <sup>345</sup> (on appeal at the First Circuit)	Michael Boudin <sup>346</sup>	George H.W. Bush <sup>347</sup>
	Sandra Lee Lynch	William J. Clinton
	Juan R. Torruella	Gerald R. Ford <sup>348</sup> and Ronald W. Reagan <sup>349</sup>
<i>Windsor v. United States</i> <sup>350</sup>	Barbara S. Jones	William J. Clinton

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341. 872 F. Supp. 2d 944 (N.D. Cal. 2012) (applying rational basis test to determine that DOMA violates plaintiffs' equal protection guarantee by precluding same-sex married couples from participating in California state employees' long-term care insurance program maintained under federal law).
342. 449 B.R. 567 (Bankr. C.D. Cal. 2011) (concluding in a unanimous decision of twenty bankruptcy judges that DOMA's bar to filing joint bankruptcy petitions by same-sex married couples violates the Fifth Amendment's Equal Protection Clause and that this result is reached under rational basis or heightened scrutiny analysis).
343. 699 F. Supp. 2d 374 (D. Mass. 2010) (applying rational basis test to conclude that DOMA's unequal treatment of same-sex married couples seeking federal employee benefits violated their Fifth Amendment equal protection rights).
344. 698 F. Supp. 2d 234 (D. Mass. 2010) (concluding that Congress's enactment of DOMA was not a legitimate exercise of its Spending Clause authority because the legislation mandates that states treat same-sex and opposite-sex married couples differently in violation of Fourteenth Amendment equal protection guarantees and that DOMA violates the Tenth Amendment by impermissibly interfering with states' rights to regulate marriage).
345. 682 F.3d 1 (1st Cir. 2012) (holding DOMA unconstitutional under a rational basis standard), *cert. denied*, 133 S. Ct. 2887 (2013).
346. Judge Boudin wrote the opinion for the unanimous panel.
347. George H.W. Bush appointed Judge Boudin first to the U.S. District Court for the District of Columbia and then to the U.S. Court of Appeals for the First Circuit.
348. Gerald Ford appointed Judge Torruella to the U.S. District Court for the District of Puerto Rico.
349. Ronald Reagan appointed Judge Torruella to the U.S. Court of Appeals for the First Circuit.
350. 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (applying rational basis test to conclude that DOMA's bar to treating same-sex couples as married for estate tax purposes violated the taxpayers' Fifth Amendment equal

<i>Windsor v. United States</i> <sup>351</sup> (on appeal at the Second Circuit)	Dennis G. Jacobs <sup>352</sup>	George H.W. Bush
	Christopher F. Droney	William J. Clinton <sup>353</sup> and Barack H. Obama <sup>354</sup>
	Chester J. Straub <sup>355</sup>	William J. Clinton

Table 2: The judge and appointing president of lower court decisions declaring DOMA unconstitutional before the Supreme Court made that determination.

In addition to serving as exemplary models of judicial independence by applying law to fact despite multiple external forces denouncing extension of any rights—and especially marriage rights—to gay men and lesbians, these federal court decisions striking down DOMA could not have been predicted based upon the political views of the presidents who appointed the jurists rendering the decisions.<sup>356</sup> As illustrated in Table 2, the majority of judges ruling in favor of marriage equality were appointed by Republican presidents. In an interesting twist, the Second Circuit jurist who wrote the *Windsor* opinion striking down DOMA was appointed by a Republican, while the dissenting judge, who characterized DOMA as a legitimate exercise of Congressional authority, was appointed by a Democrat.

As is true of the state court decisions explained previously, federal court decisions declaring DOMA unconstitutional do not result from improper “judicial activism” but rather exemplify judicial independence. In each case, the judges meticulously applied Supreme Court precedent to the largely undisputed facts presented. The First Circuit’s consolidated resolution of *Gill v. Office of Personnel Management*<sup>357</sup> and *Massachusetts v. U.S. Department of Health and*

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protection guarantees), *aff’d*, 699 F.3d 169 (2d Cir. 2012) (finding DOMA unconstitutional under intermediate scrutiny standard).

351. 699 F.3d 169 (2d Cir. 2012) (finding DOMA unconstitutional under intermediate scrutiny standard), *aff’d on other grounds*, 133 S. Ct. 2675 (2013).

352. Judge Jacobs wrote the majority opinion for the panel.

353. Bill Clinton appointed Judge Droney to the U.S. District Court for the District of Connecticut.

354. Barack Obama appointed Judge Droney to the U.S. Court of Appeals for the Second Circuit.

355. Judge Straub dissented. For more details of his dissent, see *infra* note 438. Thus, he cannot be counted among the judges that found DOMA unconstitutional.

356. As explained previously, the political affiliation of a judge—indicated by the appointing president—is a key component to the widely accepted attitudinal model of judicial decision making, a model antithetical to judicial independence. See discussion *supra* Part I.

357. 699 F. Supp. 2d 374 (D. Mass 2010).

*Human Services*<sup>358</sup> typifies this judicial independence model of judicial decision making.

In *Gill*, the district judge concluded that DOMA violates the Fifth Amendment's equal protection rights of same-sex married individuals.<sup>359</sup> In *Massachusetts*, the same judge ruled that DOMA runs afoul of both the Tenth Amendment and the Spending Clause due to its effects on marriage-equality states.<sup>360</sup> The First Circuit reviewed the trial court's summary judgment decisions *de novo*.<sup>361</sup> At the outset of the opinion, the First Circuit admitted the challenging nature of its review:

This case is difficult because it couples issues of equal protection and federalism with the need to assess the rationale for a congressional statute passed with minimal hearings and lacking in formal findings. In addition, Supreme Court precedent offers some help to each side, but the rationale in several cases is open to interpretation. We have done our best to discern the direction of these precedents, but only the Supreme Court can finally decide this unique case.<sup>362</sup>

Rather than shying away from the challenges posed by this politically charged case, the First Circuit jurists worked methodically through the arguments supporting and undermining DOMA's constitutionality and engaged in nuanced analyses of the applicable law and fact.

The court's premier obstacle was determining the potential preclusive effect of *Baker v. Nelson*.<sup>363</sup> While acknowledging that the

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358. 698 F. Supp. 2d 234 (D. Mass 2010).

359. *Gill*, 699 F. Supp. 2d at 380–83, 396–97 (finding Fifth Amendment equal protection violations in DOMA's denial of health benefits associated with federal employment, Social Security benefits based on spouse's earning record, spouse's lump sum death benefits and widower's income benefits, and joint tax return filings under the Internal Revenue Code).

360. *Massachusetts*, 698 F. Supp. 2d at 245–53 (finding DOMA: (1) an illegitimate exercise of Congress's Spending Clause authority because it forced the state to treat same-sex and opposite-sex married couples differently in situations including interment in federally-supported veterans' cemeteries, distribution of state-administered Medicaid benefits, and Medicare taxes paid by the state for its employees without providing a rational basis for doing so; and (2) contrary to the Tenth Amendment's state rights guarantees because it usurps states' traditional power to regulate marriage).

361. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 7 (1st Cir. 2012) (consolidating and affirming the judgments of the U.S. District Court for the District of Massachusetts in *Gill* and *Massachusetts*).

362. *Id.* at 7–8.

363. See discussion *supra* Part III.A.



Supreme Court's recognition of "gay rights" in *Romer* and *Lawrence* were grounded on the U.S. Constitution, the First Circuit refused to declare *Baker* irrelevant.<sup>364</sup> Because neither *Romer* nor *Lawrence* involved marriage equality, the court concluded that "*Baker* does not resolve our own case, but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage."<sup>365</sup>

Turning to the *Gill* plaintiffs' Fifth Amendment equal protection claims, the court was immediately tasked with identifying the appropriate level of judicial scrutiny. The court concluded that plaintiffs could not successfully challenge DOMA under the traditional rational basis test due to the great deference that standard affords lawmakers.<sup>366</sup> Noting the court's duty to "accept as adequate any plausible factual basis"<sup>367</sup> justifying unequal treatment of same-sex couples under the challenged statute, the court concluded that "Congress could rationally have believed that DOMA would reduce costs, even if newer studies of the actual economic effects of DOMA suggest that it may in fact raise costs for the federal government."<sup>368</sup>

The court displayed similar restraint in rejecting plaintiffs' argument that the intermediate level of scrutiny should apply. Citing First Circuit precedent resolving a constitutional challenge to the military's "Don't Ask, Don't Tell" policy, the court reported that it "has already declined to create a major new category of 'suspect classification' for statutes distinguishing based on sexual preference."<sup>369</sup> The court cited the *Romer* Court's failure to adopt such a classification.<sup>370</sup> The First Circuit concluded that restraint was required because "to create such a new suspect classification for same-sex relationships would have far-reaching implications—in particular, by implying an overruling of *Baker*, which we are neither empowered to do nor willing to predict."<sup>371</sup>

The First Circuit's rejection of standard rational basis and intermediate scrutiny to test DOMA's constitutionality led the court to a third option: a line of Supreme Court cases calling for application of a variation on standard rational basis when the challenged legislation disfavored unpopular groups. The First Circuit observed:

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364. *Massachusetts*, 682 F.3d at 8.

365. *Id.*

366. *Id.* at 9.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications. And . . . in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity.<sup>372</sup>

The First Circuit further explained that the Supreme Court neither recognized a higher level of scrutiny nor applied traditional rational basis in such cases.<sup>373</sup> Instead, the Court closely examined “the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered.”<sup>374</sup>

Applying this analysis, the First Circuit found that the “meaningful economic benefits” denied same-sex married couples under DOMA similar to those withheld from unpopular groups by legislation the Supreme Court had ruled unconstitutional.<sup>375</sup> Accordingly, “the extreme deference accorded to ordinary economic legislation . . . would not be extended to DOMA by the Supreme Court; and without insisting on ‘compelling’ or ‘important’ justifications or ‘narrow tailoring,’ the Court would scrutinize with care the purported bases for the legislation.”<sup>376</sup> Viewed through this lens, plaintiffs’ argument regarding DOMA’s usurpation of states’ traditional role in defining marriage remained relevant to—but not determinative of—DOMA’s constitutionality.<sup>377</sup>

The First Circuit rejected plaintiffs’ claims that DOMA represented overreaching by Congress under the Spending Clause or Tenth Amendment. The determination of marital status for federal

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372. *Id.* at 10. The First Circuit also relied on *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), which found a federal law that declared households with unrelated individuals ineligible for food stamps to be unconstitutional, and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), which invalidated a local ordinance as applied to deny a home for persons with mental disabilities. *Massachusetts*, 682 F.3d at 10.

373. *Massachusetts*, 682 F.3d at 10.

374. *Id.*

375. *Id.* at 11.

376. *Id.*

377. *Id.* at 11–12. The First Circuit explained that “Supreme Court precedent relating to federalism-based challenges to federal laws reinforce the need for closer than usual scrutiny of DOMA’s justifications and diminish somewhat the deference ordinarily accorded.” *Id.* The First Circuit cited Supreme Court precedent from the nineteenth century establishing that matters of domestic relations belong “to the laws of the States and not to the laws of the United States.” *Id.* at 12 (citation omitted) (quoting *In re Burrus*, 136 U.S. 586, 594 (1890)).

benefits programs presents a federal interest, the court reasoned, and DOMA is not analogous to Supreme Court precedent declaring laws unconstitutional because “Congress sought to commandeer state governments or otherwise directly dictate the *internal operations* of state government.”<sup>378</sup> Although Congress was not *dictating* internal state operations under DOMA, the court analogized to Supreme Court decisions invoking Commerce Clause and other constitutional authorities to conclude that “Congress’ effort to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws does bear on how the justifications are assessed.”<sup>379</sup>

Having found that “a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns,”<sup>380</sup> the First Circuit carefully reviewed the four justifications for DOMA found in the House Committee Report<sup>381</sup> and two related arguments advanced by BLAG. The Report’s justifications mirrored those raised in the state constitutional challenges discussed previously: “(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.”<sup>382</sup> BLAG’s additional justifications for DOMA were the “support [of] child-rearing in the context of a stable marriage”<sup>383</sup> and Congress’s intent to “freeze” the debate over same-sex marriage to provide time to “reflect.”<sup>384</sup> The First Circuit found these rationales insufficient to justify DOMA’s disparate treatment of same-sex couples.

The First Circuit rejected the defense of traditional marriage rationale because “DOMA does not increase benefits to opposite-sex couples—whose marriages may in any event be childless, unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage.”<sup>385</sup> The court characterized this

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378. *Massachusetts*, 682 F.3d at 12.

379. *Id.* at 12–13.

380. *Id.* at 13.

381. The First Circuit also found it curious that Congress would enact any statute with such tremendous ramifications for federal and state law after a single day of hearings during which “none of the testimony concerned DOMA’s effects on the numerous federal programs at issue,” and that the entire statute is only a few paragraphs long with no preface to explain its purpose. *Id.* at 13.

382. H.R. REP NO. 104-664, at 12 (1996).

383. *Massachusetts*, 682 F.3d at 14.

384. *Id.* at 15–16.

385. *Id.* at 14.

rationale not merely as a “poor fit” that might otherwise suffice under rational basis analysis, but as evincing “a lack of any demonstrated connection between DOMA’s treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.”<sup>386</sup>

While acknowledging that “[m]oral judgments can hardly be avoided in legislation,”<sup>387</sup> the court found “traditional notions of morality” insufficient to justify DOMA’s treatment of gay and lesbian couples because “*Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis.”<sup>388</sup>

The court recognized that DOMA’s usurping of the states’ power to regulate marriage “indeed is antithetical to” the goals of protecting state sovereignty and self-governance.<sup>389</sup> The First Circuit readily conceded that members of Congress may have legitimately believed that DOMA would help preserve government resources, but observed that “where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme Court precedent marks this [economic argument] as a reason undermining rather than bolstering the distinction.”<sup>390</sup>

The First Circuit found the government’s support-for-child-rearing rationale similarly unpersuasive because “DOMA cannot preclude same-sex couples . . . from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners.”<sup>391</sup> Finally, the First Circuit deemed the “time to reflect” argument insufficient to justify DOMA because the statute contained no sunset provision and because “[t]he House Report’s own arguments—moral, prudential and fiscal—make clear that DOMA was not framed as a temporary measure.”<sup>392</sup>

In wrangling with this challenging case, the First Circuit noted the federal judiciary’s disfavor for declaring legislation unconstitutional.<sup>393</sup> The court acknowledged that its review of DOMA

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386. *Id.* at 15.

387. *Id.*

388. *Id.* at 14–15 (citing *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003)).

389. *Id.* at 14. The court noted that this rationale for DOMA supported section 2 of the act, which empowers states to disregard marriages of same-sex couples from other states, but that section was not at issue in this case. *Id.*

390. *Id.* at 14.

391. *Id.*

392. *Id.* at 15.

393. *Id.* The Court stated that “[i]nvalidating a federal statute is an unwelcome responsibility for federal judges.” *Id.*

started with the presumption that Congress had acted in good faith.<sup>394</sup> “In reaching our judgment,” the court explained, “we do not rely upon the charge that DOMA’s hidden but dominant purpose was hostility to homosexuality.”<sup>395</sup> To the contrary, the court hypothesized that many members of Congress supported DOMA to “preserve the heritage of marriage as traditionally defined over centuries of Western civilization,” a motivation distinct from “mere moral disapproval of an unpopular group” as condemned by *Lawrence*.<sup>396</sup> Even so, application of the court’s “best understanding of governing precedent”<sup>397</sup> to the facts required it to strike down the statute. The First Circuit concluded:

For 150 years, this desire to maintain tradition would alone have been justification enough for almost any statute. This judicial deference has a distinguished lineage, including such figures as Justice Holmes, the second Justice Harlan, and Judges Learned Hand and Henry Friendly. But Supreme Court decisions in the last fifty years call for closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern.

. . . .

. . . Under current Supreme Court authority, Congress’ denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest.<sup>398</sup>

This explanation of the First Circuit’s resolution of *Gill* and *Massachusetts* does not mean that this court’s analysis represents the only legitimate manner in which an independent judiciary could declare DOMA unconstitutional. To the contrary, other courts that subjected DOMA to higher standards of scrutiny similarly engaged in painstaking application of law to fact. But the First Circuit’s acute deference to circuit and Supreme Court precedent, its refusal to break new paths in constitutional law, its careful application of law to the uncontested facts, its predisposition to upholding legislation, and its assumption of Congress’s good faith in enacting DOMA document that a court employing a conservative approach to constitutional analysis can—and should—find compelling grounds supporting

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394. *Id.*

395. *Id.* at 16.

396. *Id.* at 16 (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring)).

397. *Id.* at 15–16.

398. *Id.* at 16.

marriage equality in the U.S. Constitution. In short, the First Circuit's resolution of the constitutional issues in *Gill* and *Massachusetts* cannot be characterized as the work of an inappropriately "activist" court. For the reasons set forth below, the same conclusions can be drawn for the trial and circuit court decisions in *Windsor*, although the Supreme Court's opinion gives pause.

### C. *Windsor*

#### 1. District Court

Plaintiff Edith ("Edie") Windsor and her spouse, Thea Spyer, were in a committed relationship for more than four-and-a-half decades.<sup>399</sup> They registered as domestic partners in New York City when that option became available in 1993 and married in Canada in 2007.<sup>400</sup> Spyer died in 2009, and her estate passed to Windsor.<sup>401</sup> New York recognized the Windsor-Spyer marriage, but DOMA precluded the federal government from doing so.<sup>402</sup> Because of DOMA, Windsor failed to qualify for the unlimited marital deduction under 26 U.S.C. § 2056(a) and paid \$363,053 in federal estate taxes.<sup>403</sup>

Windsor initiated a refund suit alleging that DOMA's bar to her marital deduction claim violated her Fifth Amendment equal protection rights.<sup>404</sup> She urged the court to apply strict scrutiny to DOMA, a test requiring the government to prove that DOMA is narrowly tailored to serve a compelling or legitimate government interest. Windsor alternatively argued that DOMA is unconstitutional even under the highly deferential rational basis test.<sup>405</sup> The House of Representatives' Bipartisan Legal Advisory Group ("BLAG") intervened to defend DOMA after Attorney General Holder announced that the Department of Justice would no longer do so.<sup>406</sup>

After rejecting BLAG's arguments that Windsor lacked standing<sup>407</sup> and that *Baker* precluded her lawsuit,<sup>408</sup> the district court

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399. *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. The district court rejected BLAG's argument that New York State did not recognize Windsor's Canadian marriage at the time Spyer died in 2009 in light of significant evidence that New York recognized such marriages as early as 2004 and that the governor issued a directive in 2008 requiring recognition. *Id.* at 398–99.

rejected Windsor's argument that DOMA should be reviewed under strict or intermediate scrutiny.<sup>409</sup> The court observed that eleven other circuit courts had used rational basis when the challenged legislative classification was based on sexual orientation and that the Supreme Court had declined to adopt a higher level of scrutiny despite the opportunity presented by *Romer*.<sup>410</sup> "In any event," the court explained, "the constitutional question presented here may be disposed of under a rational basis review," thereby negating the need to "decide today whether homosexuals are a suspect class."<sup>411</sup>

Based on the Supreme Court's intensified rational basis review in *Lawrence*, *Romer*, and other cases involving legislation that targeted historically disfavored groups, and in light of DOMA's intrusion into matters traditionally governed by state law, the *Windsor* trial court reviewed DOMA under the enhanced rational basis test the First Circuit employed in *Gill* and *Massachusetts*.<sup>412</sup> Similar to the First Circuit's analysis, the *Windsor* trial court's careful examination of DOMA's justifications articulated in the House Report and by BLAG yielded no sufficient grounds justifying the federal government's nonrecognition of Windsor's marriage to Spyer.<sup>413</sup> On June 6, 2012, the trial court granted Windsor's motion for summary judgment and ordered the federal government to refund her estate tax payment.<sup>414</sup>

## 2. Second Circuit

The Second Circuit's de novo review affirmed Windsor's victory in a 2–1 decision.<sup>415</sup>

The majority affirmed the district court's rulings that Windsor had standing<sup>416</sup> and that *Baker* did not preclude federal courts from

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408. The district court relied on Supreme Court precedent limiting the preclusive effect of its summary affirmances "to the precise legal questions and facts presented in the jurisdictional statement." *Id.* at 399 (citations omitted). The court further explained that: (1) DOMA, unlike the Minnesota statute challenged in *Baker*, does not prohibit same-sex marriage; and (2) unlike the *Baker* plaintiffs, Windsor does not argue that marriage is a fundamental right. *Id.* Thus *Baker* had not "necessarily decided" Windsor's Fifth Amendment equal protection challenge. *Id.*

409. *Id.* at 401–02.

410. *Id.* at 401 (citations omitted).

411. *Id.* at 402. The court also noted that this conclusion honored the well-settled principle of avoiding constitutional issues superfluous to the result. *Id.* at 402 n.2.

412. *Id.* at 402.

413. *Id.* at 402–06.

414. *Id.* at 406.

415. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

addressing Windsor's Fifth Amendment equal protection claims.<sup>417</sup> Unlike the district court below and the First Circuit's recent resolution of *Gill* and *Massachusetts*, the Second Circuit in *Windsor* rejected application of enhanced rational basis review, finding that the origin of that standard in concurring and dissenting Supreme Court opinions attests to "some doctrinal instability in this area."<sup>418</sup> In any event, the Second Circuit explained that "no permutation of rational basis review is needed if heightened scrutiny is available, as it is in this case."<sup>419</sup>

Based on extensive guidance from numerous Supreme Court opinions, the Second Circuit identified these factors as determinative of heightened scrutiny's applicability to Windsor's equal protection arguments:

A) whether the class has been historically "subjected to discrimination," B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that

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416. The Second Circuit declined BLAG's request to certify to New York's highest court the issue of whether New York recognized Windsor's 2007 Canadian marriage to Spyer at the time of Spyer's death in 2009, even though New York did not allow same-sex couples to marry in that state until 2011. *Id.* at 177–78. Because the Second Circuit found the decisions of New York's intermediate appellate courts "useful and unanimous on this issue," the court found "no need to seek guidance here." *Id.* at 177–78.

417. The court distinguished the constitutional issue in *Baker* of whether *states* could restrict marriage to opposite sex couples from Windsor's challenge to the federal government's power to do so, and also noted significant changes in Supreme Court constitutional jurisprudence since *Baker*, including recognition of intermediate scrutiny and cases like *Romer* and *Lawrence* legitimizing federal constitutional claims by gay and lesbian litigants. *Id.* at 178–79; *see also id.* at 178 n.1 (collecting cases with same conclusion).

418. *Id.* at 181.

419. *Id.* Similar conclusions were reached in *Pedersen v. Office of Personnel Management*, 881 F. Supp. 2d 294 (D. Conn. 2012) (finding strict scrutiny appropriate but determining inequality resulting from DOMA could not survive even rational basis standard), *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (finding DOMA unconstitutional under either strict scrutiny or rational basis), *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (applying intermediate scrutiny to state statute denying marriage to gay and lesbian couples), and *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 412, 480 (Conn. 2008) (applying intermediate scrutiny in state constitutional law challenge to statute's denial of marriage based on sexual orientation).



define them as a discrete group[.]” and D) whether the class is “a minority or politically powerless.”<sup>420</sup>

The court further clarified that immutability and political powerlessness are relevant but “not strictly necessary factors to identify a suspect class.”<sup>421</sup> The Second Circuit encountered little difficulty in finding all these factors present in *Windsor*.

BLAG’s concession that homosexuals have been subjected to discrimination in the United States since at least the 1920s led the court to conclude that “[n]inety years of discrimination is entirely sufficient to document a ‘history of discrimination.’”<sup>422</sup>

Classification based on sexual orientation is not grounded in an “ability to perform or contribute,” the court determined, because “[t]he aversion homosexuals experience has nothing to do with aptitude or performance.”<sup>423</sup>

The requirement that the class members exhibit “obvious, immutable, or distinguishing characteristics” cannot be limited to immutability, the court reasoned, because “[c]lassifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny, . . . even though these characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference.”<sup>424</sup> Rather, the determinative factor “is whether the characteristic of the class calls down discrimination when it is manifest.”<sup>425</sup> The court also rejected BLAG’s argument that sexual orientation is too amorphous to constitute a discrete class because the class affected by DOMA “is composed entirely of persons of the same sex who have married each other . . . [and] as counsel for BLAG conceded at argument, there is nothing amorphous, capricious, or tentative about their sexual orientation.”<sup>426</sup>

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420. *Windsor*, 699 F.3d at 181 (citations omitted).

421. *Id.*

422. *Id.* at 182.

423. *Id.* at 182–83. The court also rejected BLAG’s argument “that same-sex couples have a diminished ability to discharge family roles in procreation and the raising of children” for lack of precedent, further explaining that “the abilities or inabilities cited by BLAG bear upon whether the law withstands scrutiny (the second step of analysis) rather than upon the level of scrutiny to apply.” *Id.* at 183 (citation omitted).

424. *Id.* (citation and footnote omitted). The court further observed that even though protected by the Supreme Court under intermediate scrutiny, classes defined by “[a]lienage and illegitimacy are actually subject to change.” *Id.* at 183 n.4.

425. *Id.* at 183.

426. *Id.* at 184.

In addressing the final factor, the court explained that the key issue “is not whether homosexuals have achieved political successes over the years” but rather “whether they have the strength to politically protect themselves from wrongful discrimination.”<sup>427</sup> Comparing the contemporary political status of homosexuals with the political status of women in 1973 when the Supreme Court declared intermediate scrutiny appropriate for gender-based classifications,<sup>428</sup> the Second Circuit concluded that gay men and lesbians are still unable “to adequately protect themselves from the discriminatory wishes of the majoritarian public.”<sup>429</sup>

This multifactor analysis led the Second Circuit to select intermediate scrutiny as its gauge for assessing DOMA’s constitutionality.<sup>430</sup> Accordingly, BLAG bore the burden of demonstrating how DOMA’s sexual orientation classifications are “substantially related to an important government interest.”<sup>431</sup> The Second Circuit emphasized that the justifications must be both “exceedingly persuasive”<sup>432</sup> and “genuine, not hypothesized or invented *post hoc* in response to litigation.”<sup>433</sup> BLAG’s arguments that DOMA furthered the important governmental interests of providing a uniform definition of marriage,<sup>434</sup> protecting financial resources,<sup>435</sup> avoiding the “unknown consequences” of redefining “a foundational social institution,”<sup>436</sup> and encouraging “responsible procreation”<sup>437</sup> did not satisfy the Second Circuit.<sup>438</sup>

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427. *Id.*

428. *Id.* at 184–85.

429. *Id.* at 185.

430. *Id.*

431. *Id.* (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

432. *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

433. *Id.*

434. *Id.* at 185–86. The Second Circuit found the consistency argument unpersuasive because DOMA represented an unprecedented intrusion by the federal government into an area of law uniquely reserved to the states and because DOMA “left standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity.” *Id.* at 186.

435. *Id.* at 186–87. While recognizing that financial management is an important government interest, the Second Circuit recognized that cost savings alone cannot justify discrimination and also observed that DOMA affects the application of more than 1,000 laws, many of which have nothing to do with government revenues. *Id.*

436. *Id.* at 185. The Second Circuit noted that tradition alone was not deemed sufficient to uphold sodomy laws or bans on interracial marriage, adding that DOMA is a poor means to preserve traditional

In declaring DOMA unconstitutional, the Second Circuit resisted pressure from religious groups to uphold the law. The court concluded:

Our straightforward legal analysis sidesteps the fair point that same-sex marriage is unknown to history and tradition. But law (federal *or* state) is not concerned with holy matrimony. Government deals with marriage as a civil status—however fundamental—and New York has elected to extend that status to same-sex couples. A state may enforce and dissolve a couple’s marriage, but it cannot sanctify or bless it. For that, the pair must go next door.<sup>439</sup>

The Second Circuit’s embrace of intermediate scrutiny to analyze sexual orientation discrimination is well supported by application of extant law defining that standard to the facts repeatedly established in *Windsor* and other marriage equality cases. Nonetheless, it is more challenging to characterize a case as an appropriate exercise of judicial authority when it takes a view distinct from the eleven other circuit courts that have addressed it. But novelty alone does not move the decision from an appropriate exercise of judicial independence to inappropriate activism. To the contrary, cases in which the courts have refused to act boldly have proven the most damaging to the credibility of constitutional jurisprudence by allowing the tyranny of the majority to trump the constitutional rights of unpopular minorities.<sup>440</sup> In any event, the Second Circuit’s split with its sister

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marriage because states retain the power to allow same-sex couples to marry. *Id.* at 187.

437. *Id.* at 187. The Second Circuit accepted BLAG’s characterization of promoting procreation as an important governmental interest but could not find even a rational connection between DOMA and that interest because DOMA created no additional incentives for opposite-sex couples to marry and raise children. *Id.*

438. The dissenting judge disagreed with the majority on virtually every point, concluding that *Baker* barred *Windsor*’s arguments, that the standard rational basis test should be applied to determine DOMA’s constitutionality, and that numerous arguments advanced by BLAG satisfy that standard. *Id.* at 188–211 (Straub, J., dissenting). The dissent also expressed a strong preference for the American people, rather than the judiciary, to decide the issue of marriage by same-sex couples. *Id.* at 211.

439. *Id.* at 188 (majority opinion).

440. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (upholding federal government’s exclusion order requiring relocation from the West Coast and internment of Japanese Americans during World War II despite strict scrutiny analysis required for race-based classifications); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (rejecting equal protection and other Fourteenth Amendment challenges to state law providing “equal

circuits provided an additional compelling reason for Supreme Court review.

### 3. Supreme Court

The Supreme Court's decision to hear *Windsor* raised the hopes and fears of advocates and opponents of marriage equality.<sup>441</sup> In addition to resolving DOMA's constitutionality, many observers anticipated that the Supreme Court would finally determine the appropriate level of scrutiny for equal protection challenges based on sexual orientation classifications. The Court's 5–4 decision striking down DOMA represents a landmark victory for advocates of the rights of gay men and lesbians, but it did not clarify the appropriate standard of review.<sup>442</sup>

Writing for the majority, Justice Anthony Kennedy immediately confronted two potentially dispositive issues: “whether the United States’ agreement with [the district court’s] legal position precludes further review [of DOMA’s constitutionality] and whether BLAG has standing to appeal the case.”<sup>443</sup> The Court had instructed the parties to address these issues in its order granting certiorari<sup>444</sup> and subsequently invited Harvard Law Professor Vicki Jackson to submit an amicus brief arguing against jurisdiction on both issues,<sup>445</sup> which she did.<sup>446</sup>

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but separate accommodations for the white and colored races” on railroads, and holding race-based separation an appropriate exercise of states’ police powers when regulating public transportation, schools, and other areas of public accommodation).

441. These hopes were reinforced by the Court’s acceptance of *Hollingsworth v. Perry*, a Fourteenth Amendment and fundamental right challenge to California’s state constitutional marriage ban. The trial court struck down the ban. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). The Ninth Circuit affirmed, although on grounds only applicable to California’s unique situation of having allowed same-sex marriages and then banning them. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). The Supreme Court decided *Perry* on the same day as *Windsor*, concluding that appellants lacked standing in their appeals to the Ninth Circuit and the Supreme Court. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Accordingly, the district court decision stands. Although its precedential value is limited, the district court litigation serves as a model for challenges to other states’ bans being litigated in federal courts. A more complete analysis of *Perry* is outside the scope of this article.

442. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

443. *Id.* at 2684.

444. *United States v. Windsor*, 133 S. Ct. 786 (2012).

445. *United States v. Windsor*, 133 S. Ct. 814 (2012).

446. Brief for Vicki C. Jackson as Court-Appointed *Amica Curiae* Addressing Jurisdiction, *United States v. Windsor*, 133 S. Ct. 2675

Although the government aligned with Windsor's legal position, the President's directive to the Executive Branch to continue enforcing DOMA resulted in the government's continued refusal to refund Windsor's tax payment.<sup>447</sup> The Court concluded that the government's rebuff created a justiciable controversy between Windsor and the government.<sup>448</sup> The Court further reasoned that the federal government did not achieve the same "prevailing party" status as Windsor due to the trial court's ruling—albeit a ruling the government desired—that DOMA is unconstitutional.<sup>449</sup> The Court upheld the government's standing to appeal the trial court decision by emphasizing the distinction between two bedrock principles: "the jurisdictional requirements of Article III and the prudential limits on its exercise."<sup>450</sup>

As to the Article III case and controversy requirement, the Court identified the federal government's injury-in-fact in the trial court's order "to pay money that it would not disburse but for the court's order."<sup>451</sup> As to prudential standing, the Court recognized that the government's alignment with Windsor's legal position raised concerns that the appeal might lack the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."<sup>452</sup> The Court found the potential jurisdictional bar overcome in this case due to "the Executive's unusual position"<sup>453</sup> and several other factors.

First, the participation of BLAG and amici curiae assured that DOMA would be vigorously defended.<sup>454</sup> Second, the Court considered

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(2013) (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 443. Professor Jackson is the Thurgood Marshall Professor of Constitutional Law at Harvard.

447. Holder letter, *supra* note 337 ("Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.").

448. *Windsor*, 133 S. Ct. at 2685.

449. *Id.*

450. *Id.*

451. *Id.* at 2686.

452. *Id.* at 2687 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

453. *Id.*

454. *Id.*

the consequences of jurisdictional dismissal relevant to its exercise of prudential standing. “The district courts in 94 districts throughout the Nation would be without precedential guidance,” the Court wrote, “in cases involving the whole of DOMA’s sweep involving over 1,000 federal statutes and a myriad of federal regulations.”<sup>455</sup> The Court also observed that it could take years for a similar case to work its way through the courts, meaning that “the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved.”<sup>456</sup>

Turning to the merits, the Court recognized Congress’s power to regulate marriage for discrete federal purposes.<sup>457</sup> It also recognized that the definition and regulation of marriage have historically “been treated as being within the authority and realm of the separate States.”<sup>458</sup> As a result, “the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”<sup>459</sup> Marriage laws governing the age of consent and consanguinity may (and do) vary among the states,<sup>460</sup> the Court observed, but no state marriage requirement may run afoul of the U.S. Constitution.<sup>461</sup>

Turning to Congress’s most extensive legislation governing marriage, the Court found serious constitutional flaws in Congress’s motivations for passing DOMA and the statute’s excessively broad impact on the rights, privileges, and obligations of same-sex married couples and their children. Congress’s “interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute,” the Court wrote.<sup>462</sup> “It was its essence.”<sup>463</sup> The Court cited the House Report’s multiple references to moral condemnation of homosexuality as evidence of Congress’s animus toward gay men and lesbians.<sup>464</sup> DOMA’s control “over 1,000 statutes

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455. *Id.* at 2688.

456. *Id.* The Court’s holding that the government had properly pursued its appeal negated the need to determine whether BLAG had standing to do so. *Id.*

457. *Id.* at 2690 (“Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.”).

458. *Id.*

459. *Id.* at 2691.

460. *Id.* at 2691–92.

461. *Id.* at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

462. *Id.* at 2693.

463. *Id.*

464. *Id.*

and numerous federal regulations . . . pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits" and other areas of the law,<sup>465</sup> the Court opined, "writes inequality into the entire United States Code."<sup>466</sup> The Court concluded:

[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws . . . . While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.<sup>467</sup>

DOMA is invalid, the Court reiterated, because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."<sup>468</sup>

To no one's surprise, the four dissenting justices took the majority to task at every turn.

Chief Justice Roberts found no evidence that a "bare desire to harm" motivated Congress's passage of DOMA<sup>469</sup> and predicted that the majority's reliance on federalism "will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions."<sup>470</sup>

Justice Scalia, joined by Justices Roberts and Thomas, accused the majority of possessing an "exalted conception" of the Court's role in deciding constitutional issues.<sup>471</sup> He opined that the parties' standing to appeal evaporated when "Windsor's injury was cured by

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465. *Id.* at 2694.

466. *Id.*

467. *Id.* at 2695.

468. *Id.* at 2696.

469. *Id.* (Roberts, C.J., dissenting).

470. *Id.* at 2697.

471. *Id.* at 2698 (Scalia, J., dissenting).

the judgment in her favor”<sup>472</sup> and the federal government concurred in the district court’s decision.<sup>473</sup>

Turning to the majority’s decision on the merits, Justice Scalia found the Court’s justifications “rootless and shifting”<sup>474</sup> for initially appearing to be grounded in federalism and then turning to Fifth and Fourteenth Amendment principles.<sup>475</sup> Justice Scalia reprimanded the majority for failing to address the “central question” of “whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”<sup>476</sup>

Although characterizing DOMA as violating Fifth Amendment liberty guarantees, Justice Scalia argued that “[t]he majority never utters the dread words ‘substantive due process,’ perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean.”<sup>477</sup> Justice Alito’s dissent similarly challenged the majority’s reliance on the Fifth Amendment. Substantive due process only applies to fundamental rights deeply rooted in history and tradition, Justice Alito writes, while marriage equality was not recognized by any state until the Supreme Court of Massachusetts *Goodridge* decision in 2003.<sup>478</sup> Because “the Constitution simply does not speak to the issue of same-sex marriage,”<sup>479</sup> and because the effects of same-sex marriage are unknown and potentially far reaching,<sup>480</sup> Justice Alito opined that “[a]ny change on a question so fundamental should be made by the people through their elected officials” rather than by the courts.<sup>481</sup>

Justice Scalia also characterized the majority’s opinion as a thinly disguised attempt to set the stage for reaching “the same conclusion

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472. *Id.* at 2699.

473. *Id.* at 2700. In his separate dissent, Justice Alito agreed with Justice Scalia that the federal government lacked standing to appeal. *Id.* at 2711–12 (Alito, J., dissenting). Justice Alito, however, opined that BLAG’s intervention at the trial level and continued involvement in the case satisfied the standing requirements at both the circuit court and the Supreme Court. *Id.* at 2712–14. Justice Scalia disagreed with Justice Alito’s standing analysis and conclusion. *Id.* at 2703–05 (Scalia, J., dissenting).

474. *Id.* at 2705.

475. *Id.* at 2706.

476. *Id.*

477. *Id.*

478. *Id.* at 2715 (Alito, J., dissenting).

479. *Id.* at 2716.

480. *Id.* at 2715–16.

481. *Id.* at 2716.



with regard to state laws denying same-sex couples marital status.”<sup>482</sup> After identifying several passages from the majority’s Fifth Amendment analysis that Justice Scalia views as “deliberately transposable” to future Fourteenth Amendment marriage equality cases challenging state marriage bans,<sup>483</sup> Justice Scalia predicted that “[a]s far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.”<sup>484</sup>

The dissenting justices’ sharp critiques of the majority’s opinion undermine the possibility that *Windsor* will be commonly cited as exemplary of judicial independence.<sup>485</sup> At times the majority opinion tends to meander, thus lending support to the characterization of the decision as a result in search of a rationale. As Justice Scalia observes, the opinion appears initially to be grounding itself in well-established federalism principles before making a rather abrupt turn to Fifth Amendment liberty interests. And while marriage equality litigants have long argued that marriage is a fundamental right to which same-sex couples are entitled, the Court sidesteps this long-standing and potentially dispositive issue by grounding its holding in a more amorphous Fifth Amendment liberty interest.

The validity of the *Windsor* Court’s reliance on Fifth Amendment due process will be scrutinized in exceedingly fine detail by multitudes of constitutional scholars for decades to come. As proven by  *Loving v. Virginia*,<sup>486</sup>  *Brown v. Board of Education*,<sup>487</sup> and other opinions the Court has issued on highly charged sociopolitical issues, the legitimacy of the *Windsor* decision will be finally determined through a historical rather than contemporary lens.

Analyzing the degree of judicial independence exercised by the *Windsor* majority requires identification of the decision-making model employed in this case. The *Windsor* Court’s failure to either: (1) employ standard equal protection analysis<sup>488</sup> to resolve *Windsor*’s claim, or (2) articulate a reason for rejecting that analysis provides important clues in this endeavor.

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482. *Id.* at 2709 (Scalia, J., dissenting).

483. *Id.* at 2709–10.

484. *Id.* at 2710.

485. A more comprehensive evaluation of *Windsor*’s standing analysis requires a detailed comparison to the Court’s opposite conclusion in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), which, as previously noted, is outside the scope of this article.

486. 388 U.S. 1 (1967).

487. 347 U.S. 483 (1954).

488. In this context, “standard equal protection grounds” means the Court’s application of the appropriate level of scrutiny (rational basis, enhanced rational basis, intermediate, or strict) to the justifications proffered by the government for the challenged law.

These omissions are especially curious due to myriad factors supporting application of a standard equal protection analysis to Windsor's claim. The plaintiff's complaint challenged DOMA on equal protection grounds. The Second Circuit decision under review not only relied on an equal protection analysis, but also broke ranks with other circuits<sup>489</sup>—and the Court's *Romer* decision—by declaring intermediate scrutiny applicable to legislative classifications based on sexual orientation. *Windsor's* affirmance of the Second Circuit decision, albeit on other grounds, arguably leaves intermediate scrutiny intact in non-marriage sexual orientation equality claims brought in the Second Circuit.

In addition, the primary question debated by the parties and many amici who submitted briefs to the Supreme Court was the proper level of scrutiny to be applied to *Windsor's* equal protection analysis.<sup>490</sup> And the Court clearly recognized DOMA's creation of two distinct classes: opposite-sex couples whose marriages were honored by the federal government and same-sex couples whose marriages were not.<sup>491</sup> What then can explain the Court's failure to apply—and, if necessary, to clarify—extant equal protection principles instead of charting a new course through Fifth Amendment jurisprudence?

In short, *Windsor* is a very curious opinion both for what it does and does not hold.

Only the justices who constitute the *Windsor* majority truly know what informed their individual and collective decisions to rely on Fifth Amendment substantive due process informed by equal protection and federalism principles rather than classic equal protection or fundamental right (to marry) analyses. Constitutional law is exceedingly complex, and, despite the continuing protests of Justice Scalia and other conservatives, it is of necessity an evolving body of law. Prior to *Windsor*, the Court had firmly established that the Fifth Amendment liberty interest “extends to the full range of conduct which the individual is free to pursue, and it cannot be

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489. *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (applying the rational basis test), *aff'd*, 699 F.3d 169 (2d Cir. 2012) (applying the intermediate scrutiny standard).

490. *United States v. Windsor*, 133 S. Ct. 2675, 2706 (Scalia, J., dissenting) (commenting that “[t]he opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality”).

491. *Id.* at 2694 (majority opinion) (criticizing DOMA for “creating two contradictory marriage regimes” that place “same-sex couples in an unstable position of being in a second-tier marriage”).

restricted except for a proper governmental objective.”<sup>492</sup> Each justice may firmly believe that the Fifth Amendment analysis they employed to strike down DOMA represents no more than a nuanced application of well-established law to fact, an exercise well within the bounds of judicial independence.

Another plausible explanation is that pragmatic considerations influenced the justices’ resolution of Windsor’s appeal. The *Windsor* Court strayed outside the realm of true judicial independence if the justices’ pragmatic concerns about the impact of its decision<sup>493</sup> motivated the justices’ rejection of equal protection or fundamental right analyses in favor of Fifth Amendment substantive due process.

Evidence that *Windsor* reflects pragmatic judicial decision making<sup>494</sup> is first found in the Court’s analysis of the jurisdictional issue created by the government’s alignment with the plaintiff at the trial level. In concluding that both Article III and prudential standing are satisfied, the Court emphasized the consequences of this appeal’s dismissal. The Court explained:

The district courts in 94 districts throughout the Nation would be without precedential guidance . . . in cases involving the whole of DOMA’s sweep involving over 1,000 federal statutes and a myriad of federal regulations . . . . Rights and privileges of hundreds of thousands of persons would be adversely affected.

. . .

. . . [A]t some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circumstances, the very term “prudential” counsels that it is a proper exercise of the Court’s responsibility to take jurisdiction. For these reasons, the prudential and Article III requirements are met here.<sup>495</sup>

Attaching a pragmatic label to the majority’s decision making in *Windsor* is further bolstered by considering the huge impact of the

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492. *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (finding the District of Columbia’s racially segregated school system contrary to Fifth Amendment’s liberty guarantee).

493. For the argument that pragmatic concerns influence every judicial decision, including *Windsor*, see Scherer, *supra* note 57.

494. More precisely, the judicial decision-making model employed by the *Windsor* Court is most likely restrained pragmatism, as the Court’s decision reflects both concern for the parties before it and the impact of the decision. See discussion *supra* Part II.A.

495. *Windsor*, 133 S. Ct. at 2688.

decision on states if DOMA had been declared unconstitutional on equal protection grounds. Regardless of whether the Court had employed *Romer*'s enhanced rational basis test used by most federal courts or the intermediate scrutiny employed by the Second Circuit, the Court's Fifth Amendment equal protection analysis striking down DOMA likely would be imported immediately to Fourteenth Amendment challenges to state constitutional and statutory prohibitions of marriage by same-sex couples.

Immediate application of *Windsor* to Fourteenth Amendment cases would be justified under the indissoluble link between Fifth and Fourteen Amendment jurisprudence. This link was created and endures because the Fifth Amendment contains no explicit guarantee of "equal protection." Rather, six decades ago the Supreme Court held that the Fifth Amendment's Due Process Clause incorporates *sub silentio* an equal protection component.<sup>496</sup> This reverse incorporation of Fourteen Amendment equal protection into Fifth Amendment due process eternally joins Court opinions interpreting the two.

Hence, if the *Windsor* Court had engaged in an equal protection analysis to strike down a *federal* marriage law under the Fifth Amendment, lower federal courts would employ the same analysis to resolve pending and future Fourteenth Amendment equal protection challenges to *state* marriage laws. And, because states defend their respective marriage bans on the same grounds advanced by BLAG in *Windsor* such as tradition, morality, child rearing, and conservation of resources, a *Windsor* rejection of such justifications would likely doom the states' defenses as well. In other words, a *Windsor* decision invalidating DOMA on equal protection grounds simultaneously would have sounded the death knell for state constitutional and statutory bans on marriage by same-sex couples even though the challenge to state bans was not before the Court.<sup>497</sup>

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496. *Bolling*, 347 U.S. at 499 (finding the District of Columbia's racially segregated schools created under federal charter unconstitutional on Fifth Amendment grounds for the same reasons that segregated schools created under state charters failed equal protection analysis under the Fourteenth Amendment in the companion case of *Brown v. Board of Education*); see also *Windsor*, 133 S. Ct. at 2693, 2695 (citing to *Bolling* twice in the majority opinion, but not to invoke classic equal protection analysis of DOMA); Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 975, 982-90 (2004) (explaining *Bolling* and "the absence of successful race discrimination claims against the federal government").

497. As Justice Scalia predicted, *Windsor* may have this impact on state law despite the majority's reliance on substantive due process rather than equal protection grounds. *Windsor*, 133 S. Ct. at 2709-10 (Scalia, J., dissenting). Another possibility is that courts will interpret the Court's substantive due process holding as equivalent to its recognition of a fundamental right to marry, again providing grounds for invalidating state constitutional and statutory bans. See Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219 (2013).

Of course, the Court is no stranger to invaliding state laws. *Lawrence* struck down not only the Texas sodomy law at issue but also simultaneously invalidated similar laws in twelve other states.<sup>498</sup> The *Loving* Court doomed bans on interracial marriage in Virginia and fifteen other states.<sup>499</sup> But a Supreme Court decision requiring states to recognize same-sex marriages would have invalidated thirty-two state statutes<sup>500</sup> and twenty-nine state constitutional amendments,<sup>501</sup> many of which were enacted with overwhelming voter support.<sup>502</sup> The *Windsor* majority may have perceived such a bold move as a bridge too far. Thus, pragmatism may have inspired the *Windsor* Court's restraint, even if the five justices in the majority believe that not only DOMA but also state constitutional bans violate federal constitutional guarantees.

### CONCLUSION

Former Supreme Court Justice Sandra Day O'Connor described the Court's 1954 earthshaking school desegregation decision in *Brown*

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498. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (observing that “[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct”).

499. *Loving v. Virginia*, 388 U.S. 1, 6 (1967) (stating that “Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications”).

500. The majority of statutory same-sex marriage bans were passed around the same time as DOMA's 1996 enactment. See *Marriage & Relationship Recognition Laws*, MOVEMENT ADVANCE PROJECT, [http://www.lgbtmap.org/equality-maps/marriage\\_relationship\\_laws](http://www.lgbtmap.org/equality-maps/marriage_relationship_laws) (last visited Jan. 31, 2014) (providing information on the history and status of each state's laws on marriage equality); see also *Gay Marriage*, PROCON.ORG, <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (last visited Jan. 31, 2014) [hereinafter *Gay Marriage*].

501. *Gay Marriage*, *supra* note 500 (providing the date of each state's constitutional amendment banning same-sex marriage).

502. The largest movement toward marriage inequality was the eighty-six percent approval by Mississippi voters in 2004, and the smallest margin was the four percent of voters who carried California's 2008 ban. The national average was sixty-seven percent voter approval for same-sex marriage bans prior to the most recent exercise in direct democracy: the May 2012 North Carolina ban approved by sixty-one percent of voters. See *History of State Constitutional Marriage Bans: How North Carolina's Amendment 1 Fits in the Larger Picture*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/state-constitutional-marriage-bans> (last visited Jan. 31, 2014); see also *Gay Marriage*, *supra* note 500.

*v. Board of Education*<sup>503</sup> as “an exercise of accountability to the Rule of Law over the popular will.”<sup>504</sup> As explained throughout this article, state and federal court decisions extending marriage equality, relationship recognition, and other rights and privileges to lesbian and gay individuals and couples should similarly be characterized as appropriate exercises of judicial independence, not inappropriate judicial activism. Simply put, many judges have rejected reliance on their own biases and preconceived notions about LGBT litigants in favor of applying the law to the credible and often undisputed evidence before them. *Windsor*’s apparent embrace of the pragmatic judicial decision-making model to rectify marriage inequality at the federal level while leaving inequity firmly ensconced in the vast majority of states serves as an important reminder, however, that the degree of judicial independence necessary to achieve full LGBT equality has yet to be realized.<sup>505</sup>

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503. 347 U.S. 483 (1954).

504. Sandra Day O’Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1, 3 (2008).

505. Updates on the multitude of marriage equality cases currently pending in state and federal courts are available at <http://www.lambdalegal.org/pending-marriage-equality-cases>.